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Supreme Court of the United States

October Term, 1967

No. 802

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner.

v.

ROBERT ELMER ROWE,

Respondent.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner.

v.

CLYDE MASON THACKER,

Respondent.

APPENDIX

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APPENDIX I

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 27th day of April, 1966.

Robert Elmer Rowe,

Petitioner,

against

C. C. Peyton, Superintendent of the Virginia State Penitentiary,

Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon mature consideration of the petition of Robert Elmer Rowe for a writ of habeas corpus ad subjiciendum, and the answer of the respondent to the rule to show cause entered herein on December 2, 1965, and the petitioner's reply thereto, the court doth find that the petitioner is presently detained pursuant to a judgment of the Circuit Court of Augusta County on June 18, 1963, wherein he was sentenced to serve a term of thirty years in the Virginia State Penitentiary, having been convicted of rape; that the petitioner is not now detained in pursuance to the judgment of which he complains, and the writ of habeas corpus lies only to attack the validity of the petitioner's present detention.

For the foregoing reasons, the court is of opinion that the writ should not issue as prayed. It is, therefore, adjudged and ordered that the petition for a writ of habeas corpus be dismissed, the rule discharged, that the respondent recover of the petitioner his costs by him expended about his defense herein, and that Bernard H. Cross, Esquire, who was

appointed by this court to represent the said petitioner in this proceeding, be allowed the sum of $100, for services rendered herein, his costs and necessary expenses, which amount shall be recovered by the Commonwealth, together with all unpaid fees and costs in this cause which are to be taxed by the clerk.

A Copy,

Teste:

/s/ H. G. TURNER

Clerk

Respondent's Costs:	
Attorney's fee	$50.00
Commonwealth's costs:	
Tax	$ 1.00
Clerk's fee	10.00
Fee allowed court-appointed attorney	100.00

Testee:

/s/ H. G. TURNER

Clerk

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

ROBERT ELMER ROWE

v.

C. C. PEYTON, Superintendent of the Virginia State Penitentiary

66-C-27-H

Memorandum Order

Petitioner was convicted of rape in the Circuit Court of Augusta County on June 18, 1963 and is presently serving a valid thirty year sentence imposed upon him at that time. After exhausting his state habeas corpus remedies, he comes before this court and collaterally attacks another sentence imposed upon him by the Waynesboro City Circuit Court on June 24, 1963 for secreting a female. If this second sentence barred his present eligibility for parole, the ground for his attacking it could be considered, but this is not the case. The record shows that if Rowe's twenty (20) year sentence imposed by the Circuit Court of Waynesboro City on June 24, 1963 did not exist, his parole eligibility date would be August 24, 1969. Whether he has a valid ground for attacking his second sentence is not now relevant because his attack is premature. *McNally* v. *Hill*, 293 U.S. 131 (1934). In accordance with the above it is

ORDERED

that prisoner's petition for a writ of habeas corpus is denied and it is further

ORDERED

that the petitioner be and hereby is granted leave to proceed on appeal in forma pauperis from this order.

It appearing to the Court that the petitioner raises no substantial question, it is further

ORDERED

that if the petitioner wishes to appeal, an application for a certificate of probable cause will be denied by this Court.

If the petitioner wishes to appeal, he must file written notice of appeal with this Court within thirty days from the entry of this order.

If the petitioner wishes to appeal, the Clerk of this Court is directed to transmit the record on appeal to the United States Court of Appeals for the Fourth Circuit.

Let the Clerk send copies of this order to the petitioner and the Attorney General of Virginia.

ENTER: October 26, 1966.

/s/ THOMAS J. MICHIE
United States District Judge

A TRUE COPY, TESTE:

Leigh B. Hanes, Jr., Clerk

By: /s/ DAISY H. NALLE
Deputy Clerk

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action
No. 5011

CLYDE MASON THACKER

v.

C. C. PEYTON, Superintendent of the
Virginia State Penitentiary

Memorandum Of The Court

Clyde Mason Thacker's application for a writ of habeas corpus will be denied without prejudice.

Thacker was permitted to proceed in forma pauperis. The respondent answered and Thacker replied.

Thacker attacks three sentences imposed by the Circuit Court of Hanover County on November 16, 1953, on pleas of guilty. Each sentence was for five years suspended. The suspensions were revoked March 19, 1956.

Thacker contends that these sentences are invalid because he had no legal counsel until the day of trial, he was coerced into pleading guilty, and had no counsel at the revocation proceedings.

Thacker is not presently serving these sentences. The respondent is detaining him pursuant to a judgment of the Circuit Court of Buckingham County entered September 17, 1964, which sentenced him to a term of four years in the penitentiary upon conviction of breaking and entering.

The sentence Thacker presently is serving will expire April 7, 1967. Thereafter he will begin service of a one-year sentence imposed by the Circuit Court of the City of Charlottesville, which will be followed by additional sentences imposed by that court and the Circuit Court of Greene County, the Circuit Court of Albemarle County and the Circuit Court of Madison County.

The court considered the validity of these sentences in a plenary hearing, *Thacker* v. *Peyton*, Civil Action No. 4628-M, July 12, 1966, *now pending on appeal*, No. 10,949, 4th Cir.

On December 23, 1964 a parole which had previously been given to Thacker was revoked. He has to serve nearly twenty-seven years upon the revocation. Included in this

are the sentences imposed in the Circuit Court of Hanover County. He will not begin serving these sentences until November 8, 1997.

Both the respondent and Thacker are in agreement that the sentences which he attacks do not prevent him from being eligible for parole. If the sentences were declared invalid, he still would not be eligible for parole. Thacker cannot attack these sentences under the principle expressed in *Martin* v. *Virginia,* 349 F.2d 781 (4th Cir. 1966). The limitations upon Martin are clearly stated in *Tucker* v. *Peyton,* 357 F.2d 115, 117 (4th Cir. 1966), where the court said:

> "* * * [W]e recently held in Martin v. Com. of Virginia, 4 Cir., 349 F.2d 781, that a prisoner could attack a sentence he had not yet begun to serve if, at the time, he would be eligible for parole if the questioned sentence were invalid. Petitions for the writ need not require adjudication of academic questions, but they should be readily entertained if directed to a conviction which currently substantially impinges upon the applicant's liberty. That is the plain teaching of Jones v. Cunningham [371 U.S. 236 (1962)]."

The writ will be denied without prejudce to Thacker's reapplication at the proper time.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

February 1, 1967

APPENDIX IV

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,072.

Robert Elmer Rowe,
Appellant,

versus

C. C. Peyton, Superintendent of the
Virginia State Penitentiary,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT HARRISONBURG.
THOMAS J. MICHIE, DISTRICT JUDGE.

No. 11,217.

Clyde Mason Thacker,
Appellant,

versus

C. C. Peyton, Superintendent of the
Virginia State Penitentiary,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued June 19, 1967. Decided August 28, 1967.)

Before HAYNSWORTH, Chief Judge and SOBELOFF, BOREMAN, BRYAN, WINTER and CRAVEN, Circuit Judges, sitting en banc.

John J. Kirby, Jr., (Court-assigned counsel) for Appellants, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellee.

HAYNSWORTH, Chief Judge:

We are asked to decide whether or not any remedy is available to state prisoners seeking to attack, on constitutional grounds, state sentences to be served in the future which have no present effect upon consideration of the prisoners for parole. We think that the traditional writ of habeas corpus is available to serve the clearly present need of a procedural device to test the legality of these convictions under the Constitution of the United States.

I

In 1963 Rowe was convicted of rape in Staunton, Virginia and a sentence of 30 years was imposed upon him. Three days later, in Waynesboro, Virginia, he was arraigned for the felonious abduction with intent to defile the same female of whose rape he had been convicted in

Staunton. A plea of former jeopardy was overruled, whereupon, on advice of counsel, Rowe tendered a plea of guilty. Rowe alleged that he had been told by his lawyer that any sentence imposed upon him in Waynesboro would be required to run concurrently with the thirty year sentence imposed upon him in Staunton for the rape. However, the Court imposed upon him a sentence of 20 years to run consecutively to the sentence on the rape charge, and he was committed to the penitentiary to serve the two consecutive sentences totalling fifty years.

Rowe will not begin to serve the sentence imposed upon him in Waynesboro for abduction until the year 1993. Because, under Virginia law, a prisoner, regardless of the length of his sentence, may be considered for parole after serving twelve years, Rowe is presently scheduled to become eligible for parole in 1975. If the second sentence is invalidated, Rowe's eligibility for parole will be advanced to late 1970 or early 1971.

Rowe has not attacked the first conviction for rape. He has sought to attack in the state and federal courts his second conviction, the one for abduction, on grounds of former jeopardy and of involuntariness of his guilty plea which, he alleged, was induced by the misadvice given him and the indifference of his trial counsel. Virginia concedes that, on the merits, the petition states a prima facie claim of invalidity of the abduction conviction which, if substantiated at a hearing, would require that the conviction be vacated.

II

In 1964 Clyde Thacker was committed to the Virginia State Penitentiary to serve a number of sentences totalling sixty years, four months and sixteen days. He seeks to attack three sentences which are presently scheduled to

commence in service in 1994 and to end in the year 2004. They were imposed upon him in 1953, but were suspended. The suspension was revoked in 1956.

Because of the rule of eligibility for consideration for parole after service of twelve years, Thacker will become technically eligible for such consideration in 1976. That date will not be advanced even if the three sentences under attack are vacated.

Thacker seeks to attack these three sentences upon the ground of inadequate representation by his trial counsel at the time of his convictions in 1953. The factual allegations facially show such gross neglect by the lawyer of his client's interests that, were the alleged facts established in a hearing, Thacker would be entitled to have those sentences vacated. As in Rowe's case, the Commonwealth concedes that Thacker's petition sufficiently states a constitutional claim and cannot be dismissed without a hearing if there is any appropriate remedy.

III

It is thus apparent that in 1971 when Rowe's conviction for abduction begins to affect his eligibility for consideration of parole, he will be permitted to attack that conviction.[1] On the basis of the allegations of his present petition he will be entitled to a hearing.

When Thacker becomes eligible for parole in 1976 he, too, will be allowed to attack his 1953 convictions for, while these convictions do not affect the parole eligibility date, their presence on his record is strongly calculated to weigh heavily against the grant of parole.[2] The question is whether, meanwhile, Rowe and Thacker must patiently wait until the challenged convictions begin to hurt them in

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[1] Martin v. Virginia, 4 Cir., 349 F.2d 781.

[2] Williams v. Peyton, 4 Cir., 372 F.2d 216.

terms of an immediate potential parole. The answer involves a more fundamental question, whether the courts are powerless to provide an effective remedy to vacate constitutionally defective convictions at a time when witnesses are available and their memories relatively fresh, when it is certain that, if the prisoner survives so long, there will be an available remedy some years hence.

IV

At the outset it is objected that Thacker has not pursued available state remedies. It is true that he has not, but Rowe has. His petition was rejected by the Supreme Court of Appeals of Virginia without an opinion, but in light of the factual allegations of the petition, that rejection must have been upon the procedural ground that Rowe was not presently serving the sentence he seeks to attack.[3] Thacker should not be required to travel the same road through the state courts to present a question which the Virginia Supreme Court of Appeals has so recently decided, when there is no indication that it is now prepared to depart from the former course of its decisions.[4]

V

It is further objected by the Commonwealth that the question of availability of remedies has not been presented to the Supreme Court of Appeals of Virginia in the lucid fashion in which it has been developed in this Court. This Court was concerned about the question and undertook to have it fully developed here by granting certificates of probable cause to appeal and appointing an exceptionally able

[3] That is the rule in Virginia, Peyton v. Williams, 206 Va. 595, 145 S.E. 2d 147 (1965).

[4] Evans v. Cunningham, 4 Cir., 335 F.2d 491.

lawyer who has filed a very enlightening brief. While academicians may speculate about a decision of a court in light of the quality of the advocacy as indicated by the briefs filed in the case, that is a role we should not undertake in resolving questions of exhaustion of state remedies. If the question was clearly tendered, as it was in Rowe's and other cases, and decided by the State Court, we must accept the decision as an authoritative declaration of state law even if, upon an examination of the briefs filed in the state court, we are of the opinion that they were less comprehensive and less helpful than the briefs which have been filed in this Court. Appellate courts can be greatly assisted by inspired counsel, but counsel's performance contains neither the measure nor the limit of the court's perception or analysis; Judges may know and understand many relevant things that are not intelligently discussed by lawyers in a particular case. Even when lawyers perform superbly, as they have in this case, all of the tools of decision may not be found in the briefs.

VI

We thus reach the merits of the procedural question of present availability of a federal remedy for the adjudication of constitutional validity of these state sentences to be served in the future.

The "Great Writ" has deep antecedents in the English common law as a procedural device for protecting and extending the jurisdiction of courts. As an effective weapon, for the protection of individual liberties from monarchial interference, it evolved in the Seventeenth Century, in the course of a great constitutional crisis.[5] As such it was im-

[5] For a very perceptive review of the writ's history *see* J. D. Meador, *Habeas Corpus and Magna Carta,* University of Virginia Press (1966).

ported into this country as a shield against authoritarian commitments under orders of the Crown. Available, too, for the procurement of bail for bailable offenses,[6] and for the questioning of private restraints upon individual liberties, it was not envisioned as an instrument for questioning judicial authority except in the narrowest of jurisdictional senses. The writ was unavailable to one held for trial or convicted of a felony in a court having jurisdiction of the offense and of the person of the petitioner.[7] When no sentence of a court having jurisdiction was subject to attack on habeas corpus, there was no justiciable problem of sentences to be served in the future.

When, by the Act of February 5, 1867,[8] the federal writ was extended to persons held under state commitments in violation of the Constitution, laws or treaties of the United States, our present problem still did not arise. While the statute might have been construed more broadly, the current understanding of the limitations of the writ was so definitive that the jurisdictional concept remained in full flower. A state court's commitment was not questionable in a federal habeas corpus proceeding if the offense was triable in the state court and the prisoner subject to its power.[9] There was no substantial crack in that conceptual limitation until 1915 when, in *Frank* v. *Mangum*,[10] the

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[6] *See* the Habeas Corpus Act of 1679, 31 Car. II c.7, 8 *Statutes at Large* 432-39 (1763).

[7] *Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

[8] 14 Stat. 385 (1867). The present version is 28 U.S.C.A. §§ 2241, 2243 (1958).

[9] *Ex parte* Bridges, 4 Fed. Cas. 98, 106 (No. 1862) (Cir. Ct. N.D. Ga. 1875) (Mr. Justice Bradley). The same rule applied to federal prisoners. *Ex parte* Parks, 93 U.S. 18 (1876).

[10] 237 U.S. 309 (1915). It had some precursors in *Ex parte* Siebold, 100 U.S. 371 (1879), and *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

Court assumed that a state court having jurisdiction might be ousted of it by the overriding influence of a mob.[11]

Even under this relaxing concept of "jurisdiction," which viewed some judgments as void, rather than voidable, the writ offered little encouragement to a prisoner oppressed with a sense of injustice in the imposition of a sentence to be served in the future. Nevertheless, such a case did reach the Supreme Court in 1934.[12] McNally complained of a sentence imposed upon him on the third count of a three count indictment. His contention was that the third count was so defective as to oust the court of jurisdiction to impose any sentence. He lost in the lower courts on the ground that the defect in the indictment was not so egregious as to make the sentence void, rather than voidable,[13] but the Supreme Court, bypassing that question, held that the writ was unavailable to question a sentence to be served in the future. That holding, so crucial here, will be considered in detail hereafter.

It was not until *Brown* v. *Allen*[14] that any great vista was opened to state prisoners seeking federal habeas corpus to attack state court convictions. It was then held that the writ was available to state court prisoners complaining of denials of federal constitutional rights in their trials. That vista, however, was greatly circumscribed by the limitation that the federal claim must have been clearly raised and prosecuted through the state courts.[15] It was not until 1963 that the circumscriptions of *Brown* v. *Allen* (Daniels v. Allen) were clearly and finally abandoned in *Fay* v. *Noia*.[16]

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[11] Even so, the question of the mob's influence was held to have been foreclosed by the state appellate court's negative appraisal of it.

[12] McNally v. Hill, 293 U.S. 131 (1934).

[13] McNally v. Hill, 3 Cir., 69 F.2d 38.

[14] 344 U.S. 443 (1953).

[15] Brown v. Allen (Daniels v. Allen), 344 U.S. 443, 482-87 (1953).

Meanwhile, there had been a rapid expansion of the meaning of the due process and equal protection clauses of the Fourteenth Amendment. A state prisoner had no incentive to question his conviction upon grounds of absence of counsel, inadequate performance of counsel or a multitude of other grounds until decisions came down making such deprivations matters of constitutional dimension.

It is thus apparent that the present procedural problem had no immediate urgency until very recently when the extension of the writ to obtain federal adjudication of federal constitutional issues arising during the state court proceedings[17] and the freeing of the writ's availability from technical limitations arising out of state court procedural requirements,[18] combined with the currently proceeding reinterpretation of the due process and equal protection clauses of the Fourteenth Amendment to include within their reach many things now becoming to be regarded as of fundamental fairness.[19] A few years ago, the question whether habeas corpus was available to attack a sentence to be served in the future was of little more than academic interest; today it has become a question of pressing importance to vast numbers of prisoners with colorable claims upon which to found attacks upon successive and subsequent sentences.

The problem we face simply did not exist in the Seventeenth Century. Now that recently it has arisen, if there is a substantive right crying for a remedy, it seems most inappropriate to approach a solution in terms of a Seventeenth Century technical conception which had no relation to the context in which today's problem arises.

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[16] 372 U.S. 391 (1963).

[17] Brown v. Allen, 344 U.S. 443 (1953).

[18] Fay v. Noia, 372 U.S. 391 (1963).

[19] *See generally,* Meador, *supra,* note 5.

As we have noted, the Supreme Court dealt with this problem in 1934, before it became acute, in *McNally* v. *Hill*,[20] and it then supplied the doctrinare answer. McNally was serving the second of three consecutive sentences when he sought habeas corpus to attack the third. He had served enough of the second sentence to be eligible for consideration for parole if the third sentence were invalid, but, since he was being held under the concededly valid second sentence and his immediate release could not be ordered by the court, the Supreme Court held that habeas corpus was unavailable to him. The prisoner's only purpose in seeking habeas corpus was to establish his eligibility for parole, and the Supreme Court thought that might be done by a petition for mandamus to require the Parole Board to entertain a petition for parole. The Supreme Court thought McNally should have an available remedy, but held habeas corpus the wrong route.

Since *McNally* v. *Hill* the Supreme Court has not dealt directly with the problem,[21] but it has embraced a more liberal, less technical concept of the writ. This is exemplified in such cases as *Jones* v. *Cunningham*, 371 U.S. 236 (1963), and *Fay* v. *Noia*, 372 U.S. 91 (1963). The new approach is thoroughly inconsistent with the narrowly tech-

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[20] McNally v. Hill, 293 U.S. 131 (1934).

[21] It came close to it in *Ex Parte* Hull, 312 U.S. 546 (1941), in which a prisoner was allowed to attack a second conviction which resulted in revocation of his parole and his recommitment under the earlier sentence, though he was held under the concededly valid first sentence. *Ex parte* Hull is not necessarily inconsistent with *McNally* v. *Hill*, but it was a significant departure from a mechanistic application of the old rule that habeas corpus is unavailable unless the court's order will procure the prisoner's immediate release. Heflin v. United States, 358 U.S. 15 (1959), may be regarded as an affirmation of *McNally* v. *Hill*, for while the federal prisoner there was allowed to attack the future sentence under Rule 35 of Fed. R. Crim. P., five members of the Court were of the opinion that relief was unavailable under 28 U.S.C.A. § 2255.

nical one of *McNally*. The change seemed so apparent to us that, in *Martin* v. *Commonwealth of Virginia*,[22] when we were faced with the precise *McNally* v. *Hill* issue, we concluded that the Supreme Court today would not follow it when the conviction under attack had a present adverse effect upon the prisoner's eligibility for parole. This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case. That we did in *Martin*, and we took the matter one further step in *Williams* v. *Peyton*,[23] in permitting a prisoner to attack a future sentence, though he was already eligible for parole, since the fact of the future sentence to be served was strongly calculated to influence the Parole Board's action. In each of these cases we departed from the strict holding in *McNally*. We considered it no longer controlling authority, and we will adhere to that view until the Supreme Court has an opportunity to declare what, if any, vitality that case presently retains. Certainly, *McNally's* doctrinaire approach and its dealing with the problem in terms of the old jurisdictional concept have been thoroughly rejected by the Supreme Court in recent cases.

Here, we are asked by the prisoners, of course, to go beyond the strict limits of our holdings in *Martin* and *Williams*, for the future sentences under attack here have no present effect upon their being considered for parole. While *Martin* and *Williams* represent a significant departure from

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[22] 4 Cir., 349 F.2d 781.

[23] 4 Cir., 372 F.2d 216.

the historic conception that the writ of habeas corpus was available only if the court's order would procure the immediate release of the prisoner, they were founded upon the notion that the future sentence under attack had an immediate inhibiting effect upon the petitioner's chances of obtaining conditional release on parole. To the extent that the future sentences had such an effect in *Martin* and in *Williams,* their vacation would procure the prisoner's immediate release from them. The further step we are asked to take in this case cannot be founded upon precisely the same rationale, but we have concluded that taking it is both logical and necessary.

Virginia's Attorney General seems to recognize in this case the desirability of some present remedy by which the constitutionality of these future sentences may be determined. It is certain that each of these prisoners will suffer decided detriment from them in the future, unless death in the interim relieves him of all of his burdens. If he is compelled to wait the many years until he commences service of them, or even for those several years until the future sentence has an adverse impact upon his being considered for parole, all responsible officials who participated in the trial, judge, prosecutor, lawyer, clerk and reporter, may have died, or the case have become so dim in their memories that they could contribute nothing as witnesses. If there is not now a transcript of stenographic notes of the proceedings, there is great likelihood that it would be unavailable many years hence, and unless there is a present remedy by which the substantive questions can be raised, no court has authority to require production of a transcript of such proceedings.

Enforced delay from lack of a remedy over a period of many years is, itself, a decided detriment to the prisoner.

He may lose the only means by which he may substantiate his claim. It is an even greater potential detriment to Virginia. Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary. It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established. Justice delayed for want of a procedural, remedial device over a period of many years is, indeed, justice denied to the prisoner and, in an even larger degree, to Virginia.[24]

While agreeing that provision of a present remedy would be a desirable reform, however, the Commonwealth suggests that it is a legislative matter. With this, we must disagree.

The writ of habeas corpus is not the creature of a legislature. It was a device fashioned by the common law courts to protect and extend their own jurisdiction.

In the Seventeenth Century it developed into the "Great Writ" so prized in Colonial America. In the process, it was assisted by the Petition of Right, enacted by the Parliament in 1728 to extend the writ to bring into question commitments under orders of the Crown,[25] and it received

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[24] We have previously expressed the great desirability of remedial procedures to achieve an early disposition of collateral attacks on criminal judgments. See Williams v. Peyton, 4 Cir., 372 F.2d 216; Mathis v. United States, 4 Cir., 369 F.2d 43; Martin v. Virginia, 4 Cir., 349 F.2d 216. So has the Supreme Court. United States v. Smith, 331 U.S. 469, 476 (1947).

[25] *See generally;* Meador, *supra,* Note 5.

procedural assistance in its codification in the Habeas Corpus Act of 1679,[26] but the writ was essentially the product of judicial innovation.

In this country, in Article I Section 9 of the Constitution, it was provided that the privilege of the writ shall not be suspended except when required by the public safety in times of rebellion or invasion. The Judiciary Act of 1789[27] authorized the federal courts to grant such writs, but the nature and scope of the writ was to be found neither in Article I of the Constitution nor in the Judiciary Act of 1789.

Until 1867 the writ was available in a federal court only to question federal detention. Occasions for its use were infrequent, and in most instances it was employed to question detention of individuals by the military authority acting under executive orders.[28]

By the Act of February 5, 1867[29] the federal writ was extended to procure the release of persons held in state custody in violation of the Constitution, laws or treaties of the United States. That statutory authorization, now embodied in 28 U.S.C.A. § 2241, was, unquestionably, a congressional extension of the federal writ to reach cases of state custody, but it was not immediately recognized as having expanded the scope of the writ or altered its other procedural requirements.

Thus, it was held in *Ex parte Parks*,[30] just as it had been

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[26] 31 Car. II c.7, 8 *Statutes at Large*, 432-39 (1763).

[27] 1 Stat. 81 c. 20 § 14 (1789).

[28] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Merryman, 17 Fed. Cas. 144 (No. 9487) (Cir. Ct. D.Md. 1861) (Chief Justice Taney).

[29] 14 Stat. 385 c. 28 (1867).

[30] 93 U.S. 18 (1876).

held earlier in *Ex parte Watkins,*[31] that a prisoner serving a sentence imposed by a court of competent jurisdiction had no recourse to habeas corpus. *Ex parte Parks* was concerned with a federal prisoner, but the scope of the writ was the same whether the petitioner was a state or a federal prisoner. This is clear from the statute.[32]

In the remainder of the Nineteenth Century there was little advance from that level, except that certain major defects were treated as jurisdictional.[33]

The great flowering of the writ was a mid-Twentieth Century phenomenon starting tentatively with *Frank* v. *Mangum,* budding in *Brown* v. *Allen* and blossoming with *Fay* v. *Noia.* Those tremendous developments of the writ were entirely judicial, not legislative, and if they owe some debt to a permissive construction of the Act of 1867, it was a construction discoverable only by Twentieth Century judges.[34]

When the writ as it is known today, therefore, is almost entirely the product of judicial innovation and adaptation to fit it to new situations and newly felt needs, judges should not hesitate to take a further step to adapt it to meet yet another need which is present, urgent, and recognized, even by the state.

We need not speculate about the matter, however; the Supreme Court has declared that habeas corpus "is not now and never has been a narrow, formalistic remedy; its scope has grown to achieve its grand purpose."[35] The statement

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[31] 28 U.S. (3 Pet.) 193 (1830).

[32] *See also Ex parte* Bridges, 4 Fed. Cas. 98, 106 (No. 1862) (Cir. Ct. N.D. Ga. 1875) (Mr. Justice Bradley), which did involve a state prisoner.

[33] *Ex Parte* Siebold, 100 U.S. 371 (1879); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[34] *See* United States v. Hayman, 342 U.S. 205 (1952).

[35] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

is historically accurate, and it epitomizes the governing principle of our decision.

The law today abhors a right without a remedy just as the common law did. The genius of the common law was the improvisation of remedies to obtain adjudication of substantive rights. The generative capacity did not end with the first or second generation. It is vigorously present today. If common law pleading became overly technical and debate tended to veer toward appropriateness of the writ the suitor had invoked, we, in this day of simplified pleading, should not lose sight of our judicial heritage of a continuing evolution of remedial processes to right asserted wrongs. If, despite the general abandonment of the technically difficult common law pleading in favor of a system in which the court supplies the appropriate remedy for the right asserted, we would be untrue to our judicial inheritance if we dealt ungenerously with rights still affected by the vestiges of technical limitations applied in an earlier era to common law pleadings. Our recitation of its history discloses that the writ of habeas corpus has not been a static thing. There is nothing in that history to suggest that it should be restricted to the need of a much earlier time.

Taking our direction from *Jones* v. *Cunningham's* declaration of the potentiality for growth of the writ of habeas corpus to achieve its purpose, and from *Fay* v. *Noia's* assurance of "the fullest opportunity for plenary federal judicial review"[36] and the necessity for "swift and imperative justice on habeas corpus,"[37] we conclude that we are not bound in the circumstances of these cases by the historic requirement for availability of the writ that the court's order may pro-

[36] 372 U.S. 391, 424 (1963).

[37] *Id.* at 435.

cure the immediate release of the prisoner.[38] Nor does that historic requirement limit us to the *Martin* and *Williams* situations in which the sentence under attack prevents the prisoner's being considered for parole or has an inhibiting effect upon the granting of parole. So far as the historic limitation is concerned, we conclude that the writ is available to attack any sentence, service of which will be required in the future by the same custodian who presently detains the prisoner.

This is not the end of our inquiry, however, for the statute provides that "(c) The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."[39] The statute says nothing about the court's order being able to procure a prisoner's immediate release, and the statutory requirement of custody is subject to reasonable interpretation consistent with the general purpose of the writ and its development in more recent cases in the Supreme Court.

In a technical sense, each of the prisoners here is presently serving only one of the sentences imposed to run consecutively, but in a substantive and practical sense Rowe is serving a total commitment of 50 years and Thacker one of more than 64. For purposes of determining parole eligibility, Virginia treats the aggregate time imposed by consecutive sentences as "the term of imprisonment."[40] To the prisoner, members of his family, and fellow prisoners it matters little how the order of sentence service is listed by the clerk in the superintendent's office. The one significant,

[38] *See also Ex parte* Hull, 312 U.S. 546 (1941), in which, as we have noted, the Supreme Court departed from that requirement.

[39] 28 U.S.C.A. § 2241 (1958).

[40] Va. Code Ann. § 53-251 (1967).

substantive thing is the aggregate length of his successive sentences to be served, for they govern entirely his hope for ultimate release whether by parole or by complete sentence service.

The administrative computation of the sequence of sentence service is a flimsy basis to determine the right of access to the courts for a determination of substantial constitutional claims. Virginia might, if it wished, have them served in inverse order, and an interruption in service does result in substantial changes in the order of service. In one of the cases here, Thacker seeks to attack convictions imposed upon him in 1953, but he is administratively said to be serving a sentence imposed upon him much later.[41] For a number of reasons, there must be an administrative determination of the sequence of sentence service, but however it is done, it is an arbitrary, mechanical thing subject to subsequent variation and adjustment. When the one important, substantive fact is the aggregate of all of the successive sentences a prisoner is required to serve, his right of access to the courts should not be conditioned upon the sequence in which the state chooses to list consecutive or successive sentences for service.

It is only in a highly technical sense, therefore, that each of these prisoners may be said not to be serving the sentence he seeks to attack. In a substantive sense, each is serving each of the sentences for the service of which he was committed, regardless of the sequence in which Virginia has listed them for service.

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[41] *See* Peyton v. Williams, 206 Va. 595, 145 S.E.2d 147 (1965), upholding postponement in service of an earlier sentence from which the prisoner had been released on parole until completion of service of a later sentence which occasioned his recommitment and, later, parole revocation. The converse procedure occasioned the question with which the Supreme Court dealt in *Ex parte* Hull, 312 U.S. 546 (1941).

The custody requirement of the statute has not been applied in this country in a mechanical and restricted way. In *Jones* v. *Cunningham*,[42] a parolee was held in sufficient custody to meet the requirements of the writ. We, in *Thomas* v. *Cunningham*,[43] recognized the predominating, substantive fact that a prisoner is in custody for the service of future sentences as well as the one he is administratively considered to be serving. Of the six consecutive two year sentences imposed upon Thomas, we said: "Furthermore, every preceding term was a factor in the detention under every succeeding one, because Thomas was held not only for service of the current term but as well to satisfy the subsequent terms."[44] We have also felt ourselves so unrestricted by administrative determination of sentence service as to permit a prisoner to attack a sentence which, according to the administrative record, had been fully served but the removal of which from the record, with advancement of the commencement of service of the valid terminal sentence to the time of commitment, would result in his immediate release.[45] The fact that Virginia attributed his earlier years of service to invalid sentences and his current service to a concededly valid sentence did not prevent our going to the substance of the matter.

We come to a similar conclusion here. Virginia is holding both of these prisoners not only for service of the sentence which administratively each is said to be currently serving, but for service of the subsequent ones as well. Each of them is in custody within the meaning of the statute under each of the consecutive sentences for the service of

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[42] 371 U.S. 236 (1963).

[43] 4 Cir., 335 F.2d 67.

[44] *Id.* at 69.

[45] Tucker v. Peyton, 4 Cir., 357 F.2d 115

which he was committed, and he is presently entitled to test the constitutionality of any such sentence.

While, as we observed earlier, the rationale of *Martin* and *Williams* does not dictate our conclusion here, for neither of these prisoners, in any event, will be eligible for parole; that circumstance is not crucial to the conclusion that Virginia is holding these prisoners for service of the aggregate terms of all sentences under which they have been committed. A substantive view of the matter and the relevant precedents of more recent years lead us here to the same result we reached in *Martin* and *Williams*.

Ours is a reasonable interpretation of the custodial requirement of the statute.[46] It is made particularly appropriate by the necessity of a present remedy to avoid unconscionable and injudicious delay of many years in the adjudication of justiciable claims of constitutional dimensions.

VII

Having reached the conclusion that habeas corpus is available to these prisoners, we have no occasion to consider the alternative contention that they are entitled to a declaratory judgment. The alternative contention poses a number of difficult problems;[47] the remedy to serve the pressing need for an undelayed judicial determination of these substantial claims of constitutional deprivations should be the traditional one in this area, habeas corpus. If, after a hearing, any of these convictions under attack is found to be invalid, the court may order the Warden to strike it

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[46] *See also* note 48, *infra*.

[47] *See* Note, *Postconviction Remedies: The Need for Legislative Change*, 55 Geo. L.J., 851, 875-6 (1967).

from the administrative records and, henceforth, to hold the prisoners for service of the valid convictions only.[48]

For the foregoing reasons, we conclude that the orders dismissing these petitions without a hearing were erroneous.

Reversed and remanded.

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[48] We have been concerned with the construction of 28 U.S.C.A. § 2241, which has been construed in *pari materia* with 28 U.S.C.A. § 2255. The latter section extends the writ to a federal prisoner "in custody . . . claiming the right to be released . . .," and it has been suggested that the right to release clause of § 2255 poses some conceptual difficulty in the way of our construction of § 2241. If, as we have seen, however, the detention in a substantive sense is under each of two consecutive sentences, the prisoner may be effectively released from all of the burdens of the invalid sentence by the writ's execution. The right to release clause need not be construed as requiring a claim that he be set outside the prison's walls free of the restraint of the other valid sentence. Surely, it would not be given that construction if the sentence under attack was the one which the Warden said administratively was the one then being served. As we have said, the Warden's administrative determination of the sequence of sentence service is a technical irrelevance.

SUPREME COURT, U. S.

NOV 8 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967

No. 802

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,

Petitioner,

v.

ROBERT ELMER ROWE,

Respondent.

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,

Petitioner,

v.

CLYDE MASON THACKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert Y. Button
Attorney General of Virginia

Reno S. Harp, III
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

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Supreme Court of the United States

October Term, 1967

No. .....

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

ROBERT ELMER ROWE,

Respondent.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

CLYDE MASON THACKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary prays that a writ of certiorari issue to review

judgments of the United States Court of Appeals for the Fourth Circuit entered on August 28, 1967, in the cases of Robert Elmer Rowe v. C. C. Peyton, Superintendent of the Virginia State Penitentiary, and Clyde Mason Thacker v. C. C. Peyton, Superintendent of the Virginia State Penitentiary. On September 14, 1967, the mandate in both cases was stated upon application of the Superintendent.

OPINIONS BELOW

The memorandum order and opinion of the Supreme Court of Appeals of Virginia in the case of *Rowe* v. *Peyton,* decided on April 27, 1966, is not reported, but the same will be found in the appendix to this brief.

The opinion of the United States District Judge for the Western District of Virginia, Harrisonburg Division is not reported, and it will be found in Appendix II to this brief.

Clyde Mason Thacker did not pursue any remedies in the courts of the Commonwealth of Virginia, and consequently there is no State Court opinion.

The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, will be found in Appendix III to this brief.

The opinion of the court below has not yet been reported but will be found on Appendix IV of this brief.

THE JUDGMENT

On September 14, 1967, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of a certified copy of the judgment of that Court in the premises to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That State Prisoners May Attack In A Federal Court In a Habeas Corpus Proceeding A Sentence Which They Are Not Serving But Which Will Be Served In The Future And Which Does Not Effect The Validity Of Their Present Detention?

STATUTES INVOLVED

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646. 62 Stat. 967." (28 U.S.C., Section 2254)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States,

but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

STATEMENT OF THE CASE

CLYDE M. THACKER

No. 11,217

Thacker attacks three sentences imposed upon him on November 16, 1953, in the Circuit Court of Hanover County. He pled guilty to each of the three charges of housebreaking, and his terms were suspended. He was represented by counsel, who he alleges was appointed on the same day. He further alleges that he was not represented by counsel at the time the suspended sentences were revoked.

At the time the petition was filed, Thacker was detained pursuant to a judgment of the Circuit Court of Buckingham County of September 17, 1964, wherein he was sentenced to serve a term of four years in the penitentiary, having been convicted of breaking and entering. This sentence expired on April 7, 1967, and he is presently detained pursuant to a judgment of the Corporation Court of the City of Charlottesville of October 9, 1964, wherein he was sentenced to serve one year in the penitentiary, having been convicted of statutory burglary. When he completes the service of this and other sentences imposed upon him by the Corpora-

tion Court of the City of Charlottesville, he will then commence to serve sentences imposed upon him in Greene, Albemarle, and Madison Counties. Thacker will not commence the service of the Hanover County sentences which he attacks until November 8, 1997, assuming that he continues to earn "Good Time" as provided for by Virginia law. The sentences which Thacker attacks do not prevent him from being eligible for parole, and if they were declared invalid, he would still not be eligible for parole.

He has not attacked the validity of the Hanover County sentences in any court of the Commonwealth of Virginia.

ROBERT ELMER ROWE

No. 11,072

Robert Elmer Rowe is presently detained pursuant to a judgment of the Circuit Court of Augusta County of June 18, 1963, wherein he was sentenced to serve a term of thirty years in the penitentiary, having been convicted of rape. He attacks the validity of a sentence imposed upon him on June 24, 1963, in the Circuit Court of the City of Waynesboro of twenty years for secreting a female.

He filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of Virginia, which was denied because he was not serving the sentence, but the matters raised in the brief filed in this Court were not suggested to the Supreme Court of Appeals of Virginia.

Even if this twenty year sentence was declared invalid, his parole eligibility date would be August 24, 1969.

He attacks the validity of the Waynesboro sentence on the basis that he was ineffectively represented by counsel, who told him that if he entered a plea of guilty, the Waynesboro sentence would have to run concurrently with the Augusta County sentence.

ARGUMENT

The Superintendent will demonstrate that the court below has ignored an established principle of law in reaching its decision in the premises. The question presented is a narrow one upon which this Court has previously ruled, and the decision below is contrary to the same. The court below has therefore exceeded the jurisdiction conferred upon it in the premises, and for that reason its decision should be reversed.

I.

The Court Erred In Holding That A Federal Court May Permit A State Prisoner To Attack A Sentence By Habeas Corpus To Be Served In The Future, Said Sentence Not Effecting The Validity Of His Present Detention.

It is quite clear that both petitions state a prima facie case upon which they would be entitled to a plenary hearing, if they were serving the sentences of which they complain, under both State and Federal decisions. *Whitley* v. *Cunningham,* 205 Va. 251, 135 S.E. 2d 823; *Jones* v. *Cunningham,* 297 F. 2d 851.

The Superintendent does not raise any question of exhaustion in this proceeding.

The United States Court of Appeals for the Fourth Circuit has previously dealt with several fictions in the law in connection with its decisions in *Williams* v. *Peyton,* 372 F. 2d 216, and *Martin* v. *Commonwealth,* 349 F. 2d 781, in regard to sentences to be served in the future. Here, however, in both cases now before this Court the voiding of the sentences in question would not presently make the prisoners eligible for parole.

We have no argument with the statements contained in the opinion of the court below that it would be of benefit to the Commonwealth as well as to the prisoners that a speedy adjudication of their contentions be made. This

question was presented to the Virginia Advisory Legislative Council, which has been studying habeas corpus in the State courts. The report, which was released just prior to the decision of the court below but subsequent to the argument of these cases, recommends in part: "Prisoners should be permitted to file habeas corpus petitions, not only to challenge the legality of detention under a sentence currently being served but also to challenge on the basis of a sentence which has been suspended or is to be served following the current sentence. The Virginia Advisory Legislative Council recommended that § 8-596 of the Code of Virginia be amended to provide in part: "Such petition may allege detention without lawful authority to challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by the petitioner." This report has been made to the Governor of the Commonwealth of Virginia, and appropriate legislation will be submitted at the next session of the General Assembly of Virginia, commencing in January of 1968.

It is manifest that the procedures suggested relative to the possible amendment of the statutes are far better than amendment by judicial decree. This is what has occurred in the cases now before this Court. It is far better to permit the prisoner to attack a sentence to be served in the future as soon as possible after the conviction while the records are available and the memories of the individuals are clear. Moreover, if the prisoner is required to wait a long time to attack a sentence, the witnesses will be dead and his will be the only testimony available.

While we agree with the spirit of the decision, it is quite clear that it is contrary to this Court's decision in *McNally* v. *Hill*, 293 U.S. 131. In the cited case, this Court held that the writ lies only to attack the validity of a prsoner's pres-

ent detention. While the Court in *Jones* v. *Cunningham*, 371 U.S. 236, extended the rights under the writ, the case was predicated upon the fact that the prisoner was still in custody and that he was restrained of his liberty by the Parole Board. The court below cites no case in support of its position that *McNally* has been overruled, and it is submitted that that court was bound by this decision.

The United States Court of Appeals for the Tenth Circuit has had occasion to recently decide a similar case contrary to the decision in the court below. *Vialpando* v. *Patterson*, No. 9195 (10th Cir., Sept. 19, 1967). For the convenience of the Court this opinion will be found in an appendix to this brief. In the Tenth Circuit's opinion other cases are pointed out of lower Federal courts wherein the rule in *McNally* v. *Hill, supra*, has been followed.

In view of the fact that the decision in the court below is contrary to this Court's ruling in *McNally* v. *Hill, supra*, it is clear that this Court should grant the writ of certiorari to review the judgments and reverse the same.

CONCLUSION

For the reasons stated herein, it is submitted that the writ of certiorari should be granted and the cases reversed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 8th day of November, 1967, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Mr. John J. Kirby, Jr., 4201 S. 31st Street, Apartment 808, Arlington, Virginia, counsel for the petitioners herein.

RENO S. HARP, III
Assistant Attorney General

APPENDIX I

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 27th day of April, 1966.

Robert Elmer Rowe,

Petitioner,

against

C. C. Peyton, Superintendent of the Virginia State Penitentiary,

Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon mature consideration of the petition of Robert Elmer Rowe for a writ of habeas corpus ad subjiciendum, and the answer of the respondent to the rule to show cause entered herein on December 2, 1965, and the petitioner's reply thereto, the court doth find that the petitioner is presently detained pursuant to a judgment of the Circuit Court of Augusta County on June 18, 1963, wherein he was sentenced to serve a term of thirty years in the Virginia State Penitentiary, having been convicted of rape; that the petitioner is not now detained in pursuance to the judgment of which he complains, and the writ of habeas corpus lies only to attack the validity of the petitioner's present detention.

For the foregoing reasons, the court is of opinion that the writ should not issue as prayed. It is, therefore, adjudged and ordered that the petition for a writ of habeas corpus be dismissed, the rule discharged, that the respondent recover of the petitioner his costs by him expended about his defense herein, and that Bernard H. Cross, Esquire, who was

appointed by this court to represent the said petitioner in this proceeding, be allowed the sum of $100, for services rendered herein, his costs and necessary expenses, which amount shall be recovered by the Commonwealth, together with all unpaid fees and costs in this cause which are to be taxed by the clerk.

A Copy,

Teste:
/s/ H. G. TURNER
Clerk

Respondent's Costs:	
Attorney's fee	$50.00
Commonwealth's costs:	
Tax	$ 1.00
Clerk's fee	10.00
Fee allowed court-appointed attorney	100.00

Testee:
/s/ H. G. TURNER
Clerk

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

ROBERT ELMER ROWE

v.

C. C. PEYTON, Superintendent of the Virginia State Penitentiary

66-C-27-H

Memorandum Order

Petitioner was convicted of rape in the Circuit Court of Augusta County on June 18, 1963 and is presently serving a valid thirty year sentence imposed upon him at that time. After exhausting his state habeas corpus remedies, he comes before this court and collaterally attacks another sentence imposed upon him by the Waynesboro City Circuit Court on June 24, 1963 for secreting a female. If this second sentence barred his present eligibility for parole, the ground for his attacking it could be considered, but this is not the case. The record shows that if Rowe's twenty (20) year sentence imposed by the Circuit Court of Waynesboro City on June 24, 1963 did not exist, his parole eligibility date would be August 24, 1969. Whether he has a valid ground for attacking his second sentence is not now relevant because his attack is premature. *McNally* v. *Hill*, 293 U.S. 131 (1934). In accordance with the above it is

ORDERED

that prisoner's petition for a writ of habeas corpus is denied and it is further

ORDERED

that the petitioner be and hereby is granted leave to proceed on appeal in forma pauperis from this order.

It appearing to the Court that the petitioner raises no substantial question, it is further

ORDERED

that if the petitioner wishes to appeal, an application for a certificate of probable cause will be denied by this Court.

If the petitioner wishes to appeal, he must file written notice of appeal with this Court within thirty days from the entry of this order.

If the petitioner wishes to appeal, the Clerk of this Court is directed to transmit the record on appeal to the United States Court of Appeals for the Fourth Circuit.

Let the Clerk send copies of this order to the petitioner and the Attorney General of Virginia.

ENTER: October 26, 1966.

/s/ THOMAS J. MICHIE
United States District Judge

A TRUE COPY, TESTE:

Leigh B. Hanes, Jr., Clerk

By: /s/ DAISY H. NALLE
Deputy Clerk

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action
No. 5011

CLYDE MASON THACKER

v.

C. C. PEYTON, Superintendent of the
Virginia State Penitentiary

Memorandum Of The Court

Clyde Mason Thacker's application for a writ of habeas corpus will be denied without prejudice.

Thacker was permitted to proceed in forma pauperis. The respondent answered and Thacker replied.

Thacker attacks three sentences imposed by the Circuit Court of Hanover County on November 16, 1953, on pleas of guilty. Each sentence was for five years suspended. The suspensions were revoked March 19, 1956.

Thacker contends that these sentences are invalid because he had no legal counsel until the day of trial, he was coerced into pleading guilty, and had no counsel at the revocation proceedings.

Thacker is not presently serving these sentences. The respondent is detaining him pursuant to a judgment of the Circuit Court of Buckingham County entered September 17, 1964, which sentenced him to a term of four years in the penitentiary upon conviction of breaking and entering.

The sentence Thacker presently is serving will expire April 7, 1967. Thereafter he will begin service of a one-year sentence imposed by the Circuit Court of the City of Charlottesville, which will be followed by additional sentences imposed by that court and the Circuit Court of Greene County, the Circuit Court of Albemarle County and the Circuit Court of Madison County.

The court considered the validity of these sentences in a plenary hearing, *Thacker* v. *Peyton*, Civil Action No. 4628-M, July 12, 1966, *now pending on appeal*, No. 10,949, 4th Cir.

On December 23, 1964 a parole which had previously been given to Thacker was revoked. He has to serve nearly twenty-seven years upon the revocation. Included in this

are the sentences imposed in the Circuit Court of Hanover County. He will not begin serving these sentences until November 8, 1997.

Both the respondent and Thacker are in agreement that the sentences which he attacks do not prevent him from being eligible for parole. If the sentences were declared invalid, he still would not be eligible for parole. Thacker cannot attack these sentences under the principle expressed in *Martin* v. *Virginia,* 349 F.2d 781 (4th Cir. 1966). The limitations upon Martin are clearly stated in *Tucker* v. *Peyton,* 357 F.2d 115, 117 (4th Cir. 1966), where the court said:

> "* * * [W]e recently held in Martin v. Com. of Virginia, 4 Cir., 349 F.2d 781, that a prisoner could attack a sentence he had not yet begun to serve if, at the time, he would be eligible for parole if the questioned sentence were invalid. Petitions for the writ need not require adjudication of academic questions, but they should be readily entertained if directed to a conviction which currently substantially impinges upon the applicant's liberty. That is the plain teaching of Jones v. Cunningham [371 U.S. 236 (1962)]."

The writ will be denied without prejudce to Thacker's reapplication at the proper time.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

February 1, 1967

APPENDIX IV

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,072.

Robert Elmer Rowe,
Appellant,

versus

C. C. Peyton, Superintendent of the
Virginia State Penitentiary,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT HARRISONBURG.
THOMAS J. MICHIE, DISTRICT JUDGE.

No. 11,217.

Clyde Mason Thacker,
Appellant,

versus

C. C. Peyton, Superintendent of the
Virginia State Penitentiary,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND. JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued June 19, 1967. Decided August 28, 1967.)

Before HAYNSWORTH, Chief Judge and SOBELOFF, BOREMAN, BRYAN, WINTER and CRAVEN, Circuit Judges, sitting en banc.

John J. Kirby, Jr., (Court-assigned counsel) for Appellants, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellee.

HAYNSWORTH, Chief Judge:

We are asked to decide whether or not any remedy is available to state prisoners seeking to attack, on constitutional grounds, state sentences to be served in the future which have no present effect upon consideration of the prisoners for parole. We think that the traditional writ of habeas corpus is available to serve the clearly present need of a procedural device to test the legality of these convictions under the Constitution of the United States.

I

In 1963 Rowe was convicted of rape in Staunton, Virginia and a sentence of 30 years was imposed upon him. Three days later, in Waynesboro, Virginia, he was arraigned for the felonious abduction with intent to defile the same female of whose rape he had been convicted in

Staunton. A plea of former jeopardy was overruled, whereupon, on advice of counsel, Rowe tendered a plea of guilty. Rowe alleged that he had been told by his lawyer that any sentence imposed upon him in Waynesboro would be required to run concurrently with the thirty year sentence imposed upon him in Staunton for the rape. However, the Court imposed upon him a sentence of 20 years to run consecutively to the sentence on the rape charge, and he was committed to the penitentiary to serve the two consecutive sentences totalling fifty years.

Rowe will not begin to serve the sentence imposed upon him in Waynesboro for abduction until the year 1993. Because, under Virginia law, a prisoner, regardless of the length of his sentence, may be considered for parole after serving twelve years, Rowe is presently scheduled to become eligible for parole in 1975. If the second sentence is invalidated, Rowe's eligibility for parole will be advanced to late 1970 or early 1971.

Rowe has not attacked the first conviction for rape. He has sought to attack in the state and federal courts his second conviction, the one for abduction, on grounds of former jeopardy and of involuntariness of his guilty plea which, he alleged, was induced by the misadvice given him and the indifference of his trial counsel. Virginia concedes that, on the merits, the petition states a prima facie claim of invalidity of the abduction conviction which, if substantiated at a hearing, would require that the conviction be vacated.

II

In 1964 Clyde Thacker was committed to the Virginia State Penitentiary to serve a number of sentences totalling sixty years, four months and sixteen days. He seeks to attack three sentences which are presently scheduled to

commence in service in 1994 and to end in the year 2004. They were imposed upon him in 1953, but were suspended. The suspension was revoked in 1956.

Because of the rule of eligibility for consideration for parole after service of twelve years, Thacker will become technically eligible for such consideration in 1976. That date will not be advanced even if the three sentences under attack are vacated.

Thacker seeks to attack these three sentences upon the ground of inadequate representation by his trial counsel at the time of his convictions in 1953. The factual allegations facially show such gross neglect by the lawyer of his client's interests that, were the alleged facts established in a hearing, Thacker would be entitled to have those sentences vacated. As in Rowe's case, the Commonwealth concedes that Thacker's petition sufficiently states a constitutional claim and cannot be dismissed without a hearing if there is any appropriate remedy.

III

It is thus apparent that in 1971 when Rowe's conviction for abduction begins to affect his eligibility for consideration of parole, he will be permitted to attack that conviction.[1] On the basis of the allegations of his present petition he will be entitled to a hearing.

When Thacker becomes eligible for parole in 1976 he, too, will be allowed to attack his 1953 convictions for, while these convictions do not affect the parole eligibility date, their presence on his record is strongly calculated to weigh heavily against the grant of parole.[2] The question is whether, meanwhile, Rowe and Thacker must patiently wait until the challenged convictions begin to hurt them in

[1] Martin v. Virginia, 4 Cir., 349 F.2d 781.

[2] Williams v. Peyton, 4 Cir., 372 F.2d 216.

terms of an immediate potential parole. The answer involves a more fundamental question, whether the courts are powerless to provide an effective remedy to vacate constitutionally defective convictions at a time when witnesses are available and their memories relatively fresh, when it is certain that, if the prisoner survives so long, there will be an available remedy some years hence.

IV

At the outset it is objected that Thacker has not pursued available state remedies. It is true that he has not, but Rowe has. His petition was rejected by the Supreme Court of Appeals of Virginia without an opinion, but in light of the factual allegations of the petition, that rejection must have been upon the procedural ground that Rowe was not presently serving the sentence he seeks to attack.[3] Thacker should not be required to travel the same road through the state courts to present a question which the Virginia Supreme Court of Appeals has so recently decided, when there is no indication that it is now prepared to depart from the former course of its decisions.[4]

V

It is further objected by the Commonwealth that the question of availability of remedies has not been presented to the Supreme Court of Appeals of Virginia in the lucid fashion in which it has been developed in this Court. This Court was concerned about the question and undertook to have it fully developed here by granting certificates of probable cause to appeal and appointing an exceptionally able

[3] That is the rule in Virginia, Peyton v. Williams, 206 Va. 595, 145 S.E. 2d 147 (1965).

[4] Evans v. Cunningham, 4 Cir., 335 F.2d 491.

lawyer who has filed a very enlightening brief. While academicians may speculate about a decision of a court in light of the quality of the advocacy as indicated by the briefs filed in the case, that is a role we should not undertake in resolving questions of exhaustion of state remedies. If the question was clearly tendered, as it was in Rowe's and other cases, and decided by the State Court, we must accept the decision as an authoritative declaration of state law even if, upon an examination of the briefs filed in the state court, we are of the opinion that they were less comprehensive and less helpful than the briefs which have been filed in this Court. Appellate courts can be greatly assisted by inspired counsel, but counsel's performance contains neither the measure nor the limit of the court's perception or analysis; Judges may know and understand many relevant things that are not intelligently discussed by lawyers in a particular case. Even when lawyers perform superbly, as they have in this case, all of the tools of decision may not be found in the briefs.

VI

We thus reach the merits of the procedural question of present availability of a federal remedy for the adjudication of constitutional validity of these state sentences to be served in the future.

The "Great Writ" has deep antecedents in the English common law as a procedural device for protecting and extending the jurisdiction of courts. As an effective weapon, for the protection of individual liberties from monarchial interference, it evolved in the Seventeenth Century, in the course of a great constitutional crisis.[5] As such it was im-

[5] For a very perceptive review of the writ's history *see* J. D. Meador, *Habeas Corpus and Magna Carta,* University of Virginia Press (1966).

ported into this country as a shield against authoritarian commitments under orders of the Crown. Available, too, for the procurement of bail for bailable offenses,[6] and for the questioning of private restraints upon individual liberties, it was not envisioned as an instrument for questioning judicial authority except in the narrowest of jurisdictional senses. The writ was unavailable to one held for trial or convicted of a felony in a court having jurisdiction of the offense and of the person of the petitioner.[7] When no sentence of a court having jurisdiction was subject to attack on habeas corpus, there was no justiciable problem of sentences to be served in the future.

When, by the Act of February 5, 1867,[8] the federal writ was extended to persons held under state commitments in violation of the Constitution, laws or treaties of the United States, our present problem still did not arise. While the statute might have been construed more broadly, the current understanding of the limitations of the writ was so definitive that the jurisdictional concept remained in full flower. A state court's commitment was not questionable in a federal habeas corpus proceeding if the offense was triable in the state court and the prisoner subject to its power.[9] There was no substantial crack in that conceptual limitation until 1915 when, in *Frank* v. *Mangum*,[10] the

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[6] *See* the Habeas Corpus Act of 1679, 31 Car. II c.7, 8 *Statutes at Large* 432-39 (1763).

[7] *Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

[8] 14 Stat. 385 (1867). The present version is 28 U.S.C.A. §§ 2241, 2243 (1958).

[9] *Ex parte* Bridges, 4 Fed. Cas. 98, 106 (No. 1862) (Cir. Ct. N.D. Ga. 1875) (Mr. Justice Bradley). The same rule applied to federal prisoners. *Ex parte* Parks, 93 U.S. 18 (1876).

[10] 237 U.S. 309 (1915). It had some precursors in *Ex parte* Siebold, 100 U.S. 371 (1879), and *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

Court assumed that a state court having jurisdiction might be ousted of it by the overriding influence of a mob.[11]

Even under this relaxing concept of "jurisdiction," which viewed some judgments as void, rather than voidable, the writ offered little encouragement to a prisoner oppressed with a sense of injustice in the imposition of a sentence to be served in the future. Nevertheless, such a case did reach the Supreme Court in 1934.[12] McNally complained of a sentence imposed upon him on the third count of a three count indictment. His contention was that the third count was so defective as to oust the court of jurisdiction to impose any sentence. He lost in the lower courts on the ground that the defect in the indictment was not so egregious as to make the sentence void, rather than voidable,[13] but the Supreme Court, bypassing that question, held that the writ was unavailable to question a sentence to be served in the future. That holding, so crucial here, will be considered in detail hereafter.

It was not until *Brown* v. *Allen*[14] that any great vista was opened to state prisoners seeking federal habeas corpus to attack state court convictions. It was then held that the writ was available to state court prisoners complaining of denials of federal constitutional rights in their trials. That vista, however, was greatly circumscribed by the limitation that the federal claim must have been clearly raised and prosecuted through the state courts.[15] It was not until 1963 that the circumscriptions of *Brown* v. *Allen* (Daniels v. Allen) were clearly and finally abandoned in *Fay* v. *Noia*.[16]

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[11] Even so, the question of the mob's influence was held to have been foreclosed by the state appellate court's negative appraisal of it.

[12] McNally v. Hill, 293 U.S. 131 (1934).

[13] McNally v. Hill, 3 Cir., 69 F.2d 38.

[14] 344 U.S. 443 (1953).

[15] Brown v. Allen (Daniels v. Allen), 344 U.S. 443, 482-87 (1953).

Meanwhile, there had been a rapid expansion of the meaning of the due process and equal protection clauses of the Fourteenth Amendment. A state prisoner had no incentive to question his conviction upon grounds of absence of counsel, inadequate performance of counsel or a multitude of other grounds until decisions came down making such deprivations matters of constitutional dimension.

It is thus apparent that the present procedural problem had no immediate urgency until very recently when the extension of the writ to obtain federal adjudication of federal constitutional issues arising during the state court proceedings[17] and the freeing of the writ's availability from technical limitations arising out of state court procedural requirements,[18] combined with the currently proceeding reinterpretation of the due process and equal protection clauses of the Fourteenth Amendment, to include within their reach many things now becoming to be regarded as of fundamental fairness.[19] A few years ago, the question whether habeas corpus was available to attack a sentence to be served in the future was of little more than academic interest; today it has become a question of pressing importance to vast numbers of prisoners with colorable claims upon which to found attacks upon successive and subsequent sentences.

The problem we face simply did not exist in the Seventeenth Century. Now that recently it has arisen, if there is a substantive right crying for a remedy, it seems most inappropriate to approach a solution in terms of a Seventeenth Century technical conception which had no relation to the context in which today's problem arises.

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[16] 372 U.S. 391 (1963).

[17] Brown v. Allen, 344 U.S. 443 (1953).

[18] Fay v. Noia, 372 U.S. 391 (1963).

[19] *See generally,* Meador, *supra,* note 5.

As we have noted, the Supreme Court dealt with this problem in 1934, before it became acute, in *McNally* v. *Hill*,[20] and it then supplied the doctrinare answer. McNally was serving the second of three consecutive sentences when he sought habeas corpus to attack the third. He had served enough of the second sentence to be eligible for consideration for parole if the third sentence were invalid, but, since he was being held under the concededly valid second sentence and his immediate release could not be ordered by the court, the Supreme Court held that habeas corpus was unavailable to him. The prisoner's only purpose in seeking habeas corpus was to establish his eligibility for parole, and the Supreme Court thought that might be done by a petition for mandamus to require the Parole Board to entertain a petition for parole. The Supreme Court thought McNally should have an available remedy, but held habeas corpus the wrong route.

Since *McNally* v. *Hill* the Supreme Court has not dealt directly with the problem,[21] but it has embraced a more liberal, less technical concept of the writ. This is exemplified in such cases as *Jones* v. *Cunningham*, 371 U.S. 236 (1963), and *Fay* v. *Noia*, 372 U.S. 91 (1963). The new approach is thoroughly inconsistent with the narrowly tech-

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[20] McNally v. Hill, 293 U.S. 131 (1934).

[21] It came close to it in *Ex Parte* Hull, 312 U.S. 546 (1941), in which a prisoner was allowed to attack a second conviction which resulted in revocation of his parole and his recommitment under the earlier sentence, though he was held under the concededly valid first sentence. *Ex parte* Hull is not necessarily inconsistent with *McNally* v. *Hill*, but it was a significant departure from a mechanistic application of the old rule that habeas corpus is unavailable unless the court's order will procure the prisoner's immediate release. Heflin v. United States, 358 U.S. 15 (1959), may be regarded as an affirmation of *McNally* v. *Hill*, for while the federal prisoner there was allowed to attack the future sentence under Rule 35 of Fed. R. Crim. P.; five members of the Court were of the opinion that relief was unavailable under 28 U.S.C.A. § 2255.

nical one of *McNally*. The change seemed so apparent to us that, in *Martin* v. *Commonwealth of Virginia*,[22] when we were faced with the precise *McNally* v. *Hill* issue, we concluded that the Supreme Court today would not follow it when the conviction under attack had a present adverse effect upon the prisoner's eligibility for parole. This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case. That we did in *Martin*, and we took the matter one further step in *Williams* v. *Peyton*,[23] in permitting a prisoner to attack a future sentence, though he was already eligible for parole, since the fact of the future sentence to be served was strongly calculated to influence the Parole Board's action. In each of these cases we departed from the strict holding in *McNally*. We considered it no longer controlling authority, and we will adhere to that view until the Supreme Court has an opportunity to declare what, if any, vitality that case presently retains. Certainly, *McNally's* doctrinaire approach and its dealing with the problem in terms of the old jurisdictional concept have been thoroughly rejected by the Supreme Court in recent cases.

Here, we are asked by the prisoners, of course, to go beyond the strict limits of our holdings in *Martin* and *Williams*, for the future sentences under attack here have no present effect upon their being considered for parole. While *Martin* and *Williams* represent a significant departure from

[22] 4 Cir., 349 F.2d 781.
[23] 4 Cir., 372 F.2d 216.

the historic conception that the writ of habeas corpus was available only if the court's order would procure the immediate release of the prisoner, they were founded upon the notion that the future sentence under attack had an immediate inhibiting effect upon the petitioner's chances of obtaining conditional release on parole. To the extent that the future sentences had such an effect in *Martin* and in *Williams,* their vacation would procure the prisoner's immediate release from them. The further step we are asked to take in this case cannot be founded upon precisely the same rationale, but we have concluded that taking it is both logical and necessary.

Virginia's Attorney General seems to recognize in this case the desirability of some present remedy by which the constitutionality of these future sentences may be determined. It is certain that each of these prisoners will suffer decided detriment from them in the future, unless death in the interim relieves him of all of his burdens. If he is compelled to wait the many years until he commences service of them, or even for those several years until the future sentence has an adverse impact upon his being considered for parole, all responsible officials who participated in the trial, judge, prosecutor, lawyer, clerk and reporter, may have died, or the case have become so dim in their memories that they could contribute nothing as witnesses. If there is not now a transcript of stenographic notes of the proceedings, there is great likelihood that it would be unavailable many years hence, and unless there is a present remedy by which the substantive questions can be raised, no court has authority to require production of a transcript of such proceedings.

Enforced delay from lack of a remedy over a period of many years is, itself, a decided detriment to the prisoner.

He may lose the only means by which he may substantiate his claim. It is an even greater potential detriment to Virginia. Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary. It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established. Justice delayed for want of a procedural, remedial device over a period of many years is, indeed, justice denied to the prisoner and, in an even larger degree, to Virginia.[24]

While agreeing that provision of a present remedy would be a desirable reform, however, the Commonwealth suggests that it is a legislative matter. With this, we must disagree.

The writ of habeas corpus is not the creature of a legislature. It was a device fashioned by the common law courts to protect and extend their own jurisdiction.

In the Seventeenth Century it developed into the "Great Writ" so prized in Colonial America. In the process, it was assisted by the Petition of Right, enacted by the Parliament in 1728 to extend the writ to bring into question commitments under orders of the Crown,[25] and it received

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[24] We have previously expressed the great desirability of remedial procedures to achieve an early disposition of collateral attacks on criminal judgments. See Williams v. Peyton, 4 Cir., 372 F.2d 216; Mathis v. United States, 4 Cir., 369 F.2d 43; Martin v. Virginia, 4 Cir., 349 F.2d 216. So has the Supreme Court. United States v. Smith, 331 U.S. 469, 476 (1947).

[25] *See generally;* Meador, *supra,* Note 5.

procedural assistance in its codification in the Habeas Corpus Act of 1679,[26] but the writ was essentially the product of judicial innovation.

In this country, in Article I Section 9 of the Constitution, it was provided that the privilege of the writ shall not be suspended except when required by the public safety in times of rebellion or invasion. The Judiciary Act of 1789[27] authorized the federal courts to grant such writs, but the nature and scope of the writ was to be found neither in Article I of the Constitution nor in the Judiciary Act of 1789.

Until 1867 the writ was available in a federal court only to question federal detention. Occasions for its use were infrequent, and in most instances it was employed to question detention of individuals by the military authority acting under executive orders.[28]

By the Act of February 5, 1867[29] the federal writ was extended to procure the release of persons held in state custody in violation of the Constitution, laws or treaties of the United States. That statutory authorization, now embodied in 28 U.S.C.A. § 2241, was, unquestionably, a congressional extension of the federal writ to reach cases of state custody, but it was not immediately recognized as having expanded the scope of the writ or altered its other procedural requirements.

Thus, it was held in *Ex parte Parks*,[30] just as it had been

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[26] 31 Car. II c.7, 8 *Statutes at Large*, 432-39 (1763).

[27] 1 Stat. 81 c. 20 § 14 (1789).

[28] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Merryman, 17 Fed. Cas. 144 (No. 9487) (Cir. Ct. D.Md. 1861) (Chief Justice Taney).

[29] 14 Stat. 385 c. 28 (1867).

[30] 93 U.S. 18 (1876).

held earlier in *Ex parte Watkins*,[31] that a prisoner serving a sentence imposed by a court of competent jurisdiction had no recourse to habeas corpus. *Ex parte Parks* was concerned with a federal prisoner, but the scope of the writ was the same whether the petitioner was a state or a federal prisoner. This is clear from the statute.[32]

In the remainder of the Nineteenth Century there was little advance from that level, except that certain major defects were treated as jurisdictional.[33]

The great flowering of the writ was a mid-Twentieth Century phenomenon starting tentatively with *Frank* v. *Mangum*, budding in *Brown* v. *Allen* and blossoming with *Fay* v. *Noia*. Those tremendous developments of the writ were entirely judicial, not legislative, and if they owe some debt to a permissive construction of the Act of 1867, it was a construction discoverable only by Twentieth Century judges.[34]

When the writ as it is known today, therefore, is almost entirely the product of judicial innovation and adaptation to fit it to new situations and newly felt needs, judges should not hesitate to take a further step to adapt it to meet yet another need which is present, urgent, and recognized, even by the state.

We need not speculate about the matter, however; the Supreme Court has declared that habeas corpus "is not now and never has been a narrow, formalistic remedy; its scope has grown to achieve its grand purpose."[35] The statement

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[31] 28 U.S. (3 Pet.) 193 (1830).

[32] *See also Ex parte* Bridges, 4 Fed. Cas. 98, 106 (No. 1862) (Cir. Ct. N.D. Ga. 1875) (Mr. Justice Bradley), which did involve a state prisoner.

[33] *Ex Parte* Siebold, 100 U.S. 371 (1879); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[34] *See* United States v. Hayman, 342 U.S. 205 (1952).

[35] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

is historically accurate, and it epitomizes the governing principle of our decision.

The law today abhors a right without a remedy just as the common law did. The genius of the common law was the improvisation of remedies to obtain adjudication of substantive rights. The generative capacity did not end with the first or second generation. It is vigorously present today. If common law pleading became overly technical and debate tended to veer toward appropriateness of the writ the suitor had invoked, we, in this day of simplified pleading, should not lose sight of our judicial heritage of a continuing evolution of remedial processes to right asserted wrongs. If, despite the general abandonment of the technically difficult common law pleading in favor of a system in which the court supplies the appropriate remedy for the right asserted, we would be untrue to our judicial inheritance if we dealt ungenerously with rights still affected by the vestiges of technical limitations applied in an earlier era to common law pleadings. Our recitation of its history discloses that the writ of habeas corpus has not been a static thing. There is nothing in that history to suggest that it should be restricted to the need of a much earlier time.

Taking our direction from *Jones* v. *Cunningham's* declaration of the potentiality for growth of the writ of habeas corpus to achieve its purpose, and from *Fay* v. *Noia's* assurance of "the fullest opportunity for plenary federal judicial review"[36] and the necessity for "swift and imperative justice on habeas corpus,"[37] we conclude that we are not bound in the circumstances of these cases by the historic requirement for availability of the writ that the court's order may pro-

[36] 372 U.S. 391, 424 (1963).

[37] *Id.* at 435.

cure the immediate release of the prisoner.[38] Nor does that historic requirement limit us to the *Martin* and *Williams* situations in which the sentence under attack prevents the prisoner's being considered for parole or has an inhibiting effect upon the granting of parole. So far as the historic limitation is concerned, we conclude that the writ is available to attack any sentence, service of which will be required in the future by the same custodian who presently detains the prisoner.

This is not the end of our inquiry, however, for the statute provides that "(c) The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."[39] The statute says nothing about the court's order being able to procure a prisoner's immediate release, and the statutory requirement of custody is subject to reasonable interpretation consistent with the general purpose of the writ and its development in more recent cases in the Supreme Court.

In a technical sense, each of the prisoners here is presently serving only one of the sentences imposed to run consecutively, but in a substantive and practical sense Rowe is serving a total commitment of 50 years and Thacker one of more than 64. For purposes of determining parole eligibility, Virginia treats the aggregate time imposed by consecutive sentences as "the term of imprisonment."[40] To the prisoner, members of his family, and fellow prisoners it matters little how the order of sentence service is listed by the clerk in the superintendent's office. The one significant,

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[38] *See also Ex parte* Hull, 312 U.S. 546 (1941), in which, as we have noted, the Supreme Court departed from that requirement.

[39] 28 U.S.C.A. § 2241 (1958).

[40] Va. Code Ann. § 53-251 (1967).

substantive thing is the aggregate length of his successive sentences to be served, for they govern entirely his hope for ultimate release whether by parole or by complete sentence service.

The administrative computation of the sequence of sentence service is a flimsy basis to determine the right of access to the courts for a determination of substantial constitutional claims. Virginia might, if it wished, have them served in inverse order, and an interruption in service does result in substantial changes in the order of service. In one of the cases here, Thacker seeks to attack convictions imposed upon him in 1953, but he is administratively said to be serving a sentence imposed upon him much later.[41] For a number of reasons, there must be an administrative determination of the sequence of sentence service, but however it is done, it is an arbitrary, mechanical thing subject to subsequent variation and adjustment. When the one important, substantive fact is the aggregate of all of the successive sentences a prisoner is required to serve, his right of access to the courts should not be conditioned upon the sequence in which the state chooses to list consecutive or successive sentences for service.

It is only in a highly technical sense, therefore, that each of these prisoners may be said not to be serving the sentence he seeks to attack. In a substantive sense, each is serving each of the sentences for the service of which he was committed, regardless of the sequence in which Virginia has listed them for service.

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[41] *See* Peyton v. Williams, 206 Va. 595, 145 S.E.2d 147 (1965), upholding postponement in service of an earlier sentence from which the prisoner had been released on parole until completion of service of a later sentence which occasioned his recommitment and, later, parole revocation. The converse procedure occasioned the question with which the Supreme Court dealt in *Ex parte* Hull, 312 U.S. 546 (1941).

The custody requirement of the statute has not been applied in this country in a mechanical and restricted way. In *Jones* v. *Cunningham,*[42] a parolee was held in sufficient custody to meet the requirements of the writ. We, in *Thomas* v. *Cunningham,*[43] recognized the predominating, substantive fact that a prisoner is in custody for the service of future sentences as well as the one he is administratively considered to be serving. Of the six consecutive two year sentences imposed upon Thomas, we said: "Furthermore, every preceding term was a factor in the detention under every succeeding one, because Thomas was held not only for service of the current term but as well to satisfy the subsequent terms."[44] We have also felt ourselves so unrestricted by administrative determination of sentence service as to permit a prisoner to attack a sentence which, according to the administrative record, had been fully served but the removal of which from the record, with advancement of the commencement of service of the valid terminal sentence to the time of commitment, would result in his immediate release.[45] The fact that Virginia attributed his earlier years of service to invalid sentences and his current service to a concededly valid sentence did not prevent our going to the substance of the matter.

We come to a similar conclusion here. Virginia is holding both of these prisoners not only for service of the sentence which administratively each is said to be currently serving, but for service of the subsequent ones as well. Each of them is in custody within the meaning of the statute under each of the consecutive sentences for the service of

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[42] 371 U.S. 236 (1963).

[43] 4 Cir., 335 F.2d 67.

[44] *Id.* at 69.

[45] Tucker v. Peyton, 4 Cir., 357 F.2d 115

which he was committed, and he is presently entitled to test the constitutionality of any such sentence.

While, as we observed earlier, the rationale of *Martin* and *Williams* does not dictate our conclusion here, for neither of these prisoners, in any event, will be eligible for parole, that circumstance is not crucial to the conclusion that Virginia is holding these prisoners for service of the aggregate terms of all sentences under which they have been committed. A substantive view of the matter and the relevant precedents of more recent years lead us here to the same result we reached in *Martin* and *Williams*.

Ours is a reasonable interpretation of the custodial requirement of the statute.[46] It is made particularly appropriate by the necessity of a present remedy to avoid unconscionable and injudicious delay of many years in the adjudication of justiciable claims of constitutional dimensions.

VII

Having reached the conclusion that habeas corpus is available to these prisoners, we have no occasion to consider the alternative contention that they are entitled to a declaratory judgment. The alternative contention poses a number of difficult problems;[47] the remedy to serve the pressing need for an undelayed judicial determination of these substantial claims of constitutional deprivations should be the traditional one in this area, habeas corpus. If, after a hearing, any of these convictions under attack is found to be invalid, the court may order the Warden to strike it

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[46] *See also* note 48, *infra*.

[47] *See* Note, *Postconviction Remedies: The Need for Legislative Change*, 55 Geo. L.J., 851, 875-6 (1967).

from the administrative records and, henceforth, to hold the prisoners for service of the valid convictions only.[48]

For the foregoing reasons, we conclude that the orders dismissing these petitions without a hearing were erroneous.

Reversed and remanded.

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[48] We have been concerned with the construction of 28 U.S.C.A. § 2241, which has been construed in *pari materia* with 28 U.S.C.A. § 2255. The latter section extends the writ to a federal prisoner "in custody . . . claiming the right to be released . . .," and it has been suggested that the right to release clause of § 2255 poses some conceptual difficulty in the way of our construction of § 2241. If, as we have seen, however, the detention in a substantive sense is under each of two consecutive sentences, the prisoner may be effectively released from all of the burdens of the invalid sentence by the writ's execution. The right to release clause need not be construed as requiring a claim that he be set outside the prison's walls free of the restraint of the other valid sentence. Surely, it would not be given that construction if the sentence under attack was the one which the Warden said administratively was the one then being served. As we have said, the Warden's administrative determination of the sequence of sentence service is a technical irrelevance.

APPENDIX V

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM 1967

No. 9195

CHRISTOFORO RAMON VIALPANDO,

Appellant,

vs.

WAYNE K. PATTERSON, Warden of the Colorado State Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Cannon Harvey (Judson W. Detrick on the brief) for Appellant.

James F. Pamp (Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James F. Pamp, Assistant Attorney General, on the brief) for Appellee.

Before JONES*, SETH and HICKEY, Circuit Judges.

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* of the Fifth Circuit, sitting by designation.

PER CURIAM:

The appellant, while serving a sentence of a court of Colorado in a prison of that state, attempted to escape and was sentenced, following a plea of guilty, for felonious escape. He was given a five year sentence to run consecutively with the sentence previously given. His good time accrual under his first sentence was forfeited by the attempted escape. He asserted, by a petition for habeas corpus, that because of the forfeiture of good time, he was placed in double jeopardy when charged for the escape as a separate offense. He also claims the information against him was improper, insufficient and violative of the Due Process Clause of the Federal Constitution.

The appellant is now confined by the State of Colorado under the first sentence. The validity of this sentence is not questioned. Granting the writ as to the second sentence would not effect the appellant's release.

In a leading case the Supreme Court, citing or making reference to Bacon's Abridgment, Hale's Pleas to the Crown, Coke's Institutes and many recent authorities, stated the principle in these words:

> "The purpose of the proceeding . . . was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention was found to be unlawful." McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238.

In another leading case it was stated:

> "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed,

it has no other power; it cannot revise the state court judgment; it can only act on the body of the petitioner." Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837.

Among the many cases of this Court in which the doctrine has been stated and applied are Carpenter v. Crouse, 10th Cir. 1966, 358 F.2d 701; Osborne v. Taylor, 10th Cir. 1964, 328 F.2d 131, cert. den. 377 U.S. 1002, 84 S.Ct. 1936, 12 L.Ed. 2d 1051, reh den. 379 U.S. 874, 85 S.Ct. 25, 13 L.Ed. 2d 82; McGann v. Taylor, 10th Cir. 1961, 289 F.2d 820, cert. den. 368 U.S. 904, 82 S.Ct. 182, 7 L.Ed. 2d 98.

Since the district court was without power to discharge the prisoner from custody, its order denying the petition for habeas corpus was a proper one.

That order is

AFFIRMED.

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Supreme Court of the United States

October Term, 1967

No. 802

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

ROBERT ELMER ROWE,
Respondent.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

CLYDE MASON THACKER,
Respondent.

BRIEF FOR PETITIONER

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CLYDE MASON THACKER,

Respondent.

BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

On January 17, 1968, this Court granted a writ of certiorari to review judgments of the United States Court of Appeals for the Fourth Circuit entered on August 28, 1967, in the cases of Robert Elmer Rowe v. C. C. Peyton, Superintendent of the Virginia State Penitentiary, and Clyde Mason Thacker v. C. C. Peyton, Superintendent of the Virginia State Penitentiary.

OPINIONS BELOW

The memorandum order and opinion of the Supreme Court of Appeals of Virginia in the case of Rowe v. Peyton, decided on April 27, 1966, is not reported, but will be found in Appendix I.

The opinion of the United States District Judge for the Western District of Virginia, Harrisonburg Division, in the case of Rowe v. Peyton is not reported and will be found in Appendix II.

Clyde Mason Thacker did not pursue any remedies in the courts of the Commonwealth of Virginia, and consequently there is no State court opinion in his case.

The opinion of the United States District Court for the Eastern District of Virginia, Richmond, Division, in the case of Thacker v. Peyton is not reported and will be found in Appendix III.

The opinion of the court below (*Rowe* v. *Peyton,* 383 F. 2d 709, 4th Cir. [1967]) is found in Appendix IV.

THE JUDGMENT

On September 14, 1967, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of a certified copy of the judgments of that Court in these two cases to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court.

JURISDICTION

The judisdiction of this court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646. 62 Stat. 967." (28 U.S.C., Section 2254)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That State Prisoners May Attack In A Federal Court In A Habeas Corpus Proceeding A Sentence Which They Are Not Serving But Which Will Be Served In The Future And Which Does Not Effect The Validity Of Their Present Detention?

STATEMENT OF THE CASE

CLYDE M. THACKER

No. 11,217

Clyde Mason Thacker attacks three sentences imposed upon him on November 16, 1953, in the Circuit Court of Hanover County. Having entered a plea of guilty to each of the three charges of housebreaking, his terms were suspended by order of the Court. He was represented by counsel, who he alleges was appointed on the same day. He further alleges that he was not represented by counsel on March 19, 1956, when the suspension of each of the three sentences was revoked and he was directed to serve a term of five years imposed on each charge.

At the time the petition was filed in the District Court, Thacker was detained pursuant to a judgment of the Circuit Court of Buckingham County, Virginia, of September 17, 1964, wherein he was sentenced to serve a term of four years in the Virginia State Penitentiary, having been convicted of breaking and entering. This sentence expired on April 7, 1967, and he is presently detained pursuant to a judgment of the Corporation Court of the City of Charlottesville, Virginia, of October 9, 1964, wherein he was sentenced to serve a term of one year in the penitentiary, having been convicted of statutory burglary. When he completes the service of this and other sentences imposed by the Corporation

Court of the City of Charlottesville, he will then commence to serve sentences imposed upon him in the Circuit Courts of Greene, Albemarle, and Madison Counties. He will then serve a sentence imposed upon him as a second time offender in the Circuit Court of the City of Richmond and other sentences imposed upon him in the Circuit Courts of Henrico, Chesterfield and Powhatan Counties. Assuming that Thacker continues to earn "good time" as provided for by Virginia law, he will commence the service of the Hanover County sentences in question on November 8, 1997. The three five-year sentences which Thacker attacks do not prevent him from being eligible for parole, and if they were declared invalid, he still would not be eligible for parole, nor would his parole eligibility date be changed.

Thacker did not attack these three sentences in the courts of the Commonwealth of Virginia.

ROBERT ELMER ROWE

No. 11,072

Robert Elmer Rowe is presently detained pursuant to a judgment of the Circuit Court of Augusta County, Virginia, of June 18, 1963, wherein he was sentenced to serve a term of thirty years in the penitentiary, having been convicted of rape. This sentence will expire on September 24, 1982. He attacks the validity of a sentence imposed upon him on June 24, 1963, in the Circuit Court of the City of Waynesboro, wherein he was sentenced to serve twenty years in the penitentiary for secreting a female.

He filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of Virginia, which court on April 27, 1966, dismissed the petition for the reason that Rowe was not serving the sentence of which he complained.

The voiding of the Waynesboro sentence would change his parole eligibility date to August 24, 1969.

He attacks the validity of the Waynesboro sentence on the basis that he was ineffectively represented by counsel, who told him that if he entered a plea of guilty the Waynesboro sentence would have to run concurrently with the sentence imposed upon him in the Circuit Court of Augusta County.

ARGUMENT

The Superintendent will demonstrate that the court below has ignored an established principle of law in reaching its decision in the premises. The question presented is a narrow one, upon which this Court has previously ruled, and the decision below is contrary to the same as well as contrary to the decisions of other Circuit Courts of Appeal. The United States Court of Appeals for the Fourth Circuit has therefore exceeded the jurisdiction conferred upon it in the premises, and for that reason its decision should be reversed.

I.

The Court Erred In Holding That A Federal Court May Permit A State Prisoner To Attack A Sentence By Habeas Corpus To Be Served In The Future, Said Sentence Not Affecting The Validity Of His Present Detention.

It is manifest from a reading of each of the petitions filed that the same state a prima facie case and that the prisoners would be entitled to a plenary hearing if they were serving the sentences of which they complained. This is true under both State and Federal decisions. *Whitley* v. *Cunningham,* 205 Va. 251, 131 S.E. 2d 823 (1964); *Burley* v. *Peyton,* 206 Va. 546, 145 S.E. 2d 175 (1965); *Jones* v. *Cunningham,* 297 F. 2d 851 (4th Cir. 1962).

The Superintendent does not raise any question of exhaustion in this proceeding.

In *McNally* v. *Hill,* 293 U.S. 131 (1934) this Court held that the writ lies only to attack the validity of a prisoner's present detention. The United States Court of Appeals for the Fourth Circuit declined to follow this Court's decision in the cited case in considering the two cases now before this Court.

Other Circuit Courts of Appeal have had occasion to consider this question and have followed the rule of stare decisis and this Court's decision in *McNally.* The Ninth Circuit Court of Appeals in *Arketa* v. *Wilson,* 373 F. 2d 582 (9th Cir., 1967) and *Collins* v. *Clinger,* 353 F. 2d 731 (9th Cir., 1965) followed *McNally,* declining to follow the Fourth Circuit's decision in *Martin* v. *Virginia,* 349 F. 2d 781.

Likewise, the Tenth Circuit has recently refused to consider the validity of a sentence to be served in the future. *Vialpando* v. *Patterson,* 382 F. 2d 588 (10th Cir., 1967); *Roberts* v. *Croust,* 350 F. 2d 299 (10th Cir., 1965).

The Sixth Circuit Court of Appeals in *McIntosh* v. *Steele,* 184 F. 2d 721 (8th Cir., 1950), has continued to follow this Court's decision in *McNally.*

The Seventh Circuit Court of Appeals in *United States ex rel. Devoney* v. *Pate,* 359 F. 2d 829 (7th Cir., 1966) has continued to follow *McNally.* See also *Welsh* v. *Markly,* 338 F. 2d 561 (7th Cir., 1964) and *Postelwait* v. *Markly,* 342 F. 2d 677 (7th Cir., 1965).

The United States Court of Appeals for the Sixth Circuit has also continued to follow this Court's decision in *McNally. Lowther* v. *Maxwell,* 347 F. 2d 941 (6th Cir., 1965).

In *Brown* v. *Beto,* 377 F. 2d 950 (5th Cir., 1967), the Fifth Circuit Court of Appeals carefully examines the decisions of other circuits on this question and adheres to the *McNally* rule.

In a short per curiam opinion the Third Circuit Court of Appeals in *Gailes* v. *Yeager,* 324 F. 2d 630 (3rd Cir., 1963), adheres to the *McNally* rule.

Likewise, the District of Columbia Circuit Court of Appeals has felt that it is bound by the *McNally* rule. *Moon* v. *United States,* 272 F. 2d 530 (D. C. Cir., 1959).

As hereinbefore pointed out, the Court below held that both of these State prisoners could attack in a Federal Court in a habeas corpus proceeding a sentence which they are not now serving but which will be served in the future and which sentence does not affect the validity of their present detention. This Court in *McNally* v. *Hill,* 293 U.S. 131 (1934) held that the writ of habeas corpus in a federal court lies only to attack the validity of the prisoner's present detention, while the Court in *Jones* v. *Cunningham,* 371 U.S. 236 (1963) extended the rights under the writ. The decision was predicated upon the fact that the prisoner was still in custody in that he was restrained of his liberty by the Virginia Parole Board. The Court below points to no decision of this Court which overrules *McNally.*

The principles of *McNally* were reaffirmed by this Court in *Holiday* v. *Johnston,* 313 U.S. 342, 349 (1941). Likewise, in *Heflin* v. *United States,* 358 U.S. 415 (1959), this Court affirmed its belief in the *McNally* doctrine.

In *Fay* v. *Noia,* 372 U.S. 391, 432 (1962), this Court said:

> "Surely this state interest in an airtight system of forfeitures is of a different order from that, vindicated in Murdock, in the autonomy of state law within the

> proper sphere of its substantive regulation. The difference is illustrated in the settled principle that if a prisoner is detained lawfully under one count of the indictment, he cannot challenge the lawfulness of a second count on federal habeas. McNally v. Hill, 293 US 131, 79 L ed 238, 55 S Ct 24. For the federal court to order the release of such a prisoner would be to nullify a proceeding—that under the first count—wholly outside the orbit of federal interest. Contrariwise, the only count under which Noia was convicted and imprisoned is admitted to be vitiated by force of federal law."

In view of the foregoing, it is manifest that this Court has consistently adhered to the *McNally* doctrine and that a prisoner may attack only the validity of a sentence he is presently serving.

It is clear that the United States Court of Appeals for the Fourth Circuit has previously dealt with several fictions in the law in connection with its decisions in *Williams* v. *Peyton,* 372 F. 2d 216 (4th Cir. 1967) and *Martin* v. *Virginia,* 349 F. 2d 781 (4th Cir. 1965), permitting state prisoners to attack sentences to be served in the future in federal courts. These cases were premised upon the fact that the prisoners would become eligible for parole by voiding a sentence to be served in the future. In the cases now before this Court, neither of these two holdings are applicable herein.

It is manifest that should the decision of the Court below be followed it would inure to the benefit of the Commonwealth and to the prisoner. A speedy adjudication of the prisoner's claims before the witnesses die and memories grow dim is certainly to the advantage of the people of our Commonwealth. This question was presented to the Virginia Advisory Legislative Council, which has been study-

ing habeas corpus in the courts of the Commonwealth. The report, which was released just prior to the decision of the Court below but subsequent to the argument of these cases, recommends in part:

> "Prisoners should be permitted to file habeas corpus petitions, not only to challenge the legality of detention under a sentence currently being served but also to challenge on the basis of a sentence which has been suspended or is to be served following the current sentence. The Virginia Advisory Legislative Council recommends that § 8-596 of the Code of Virginia be amended to provide in part: 'Such petition may allege detention without lawful authority to challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by the petitioner.'"

This report has been made to the Governor of the Commonwealth of Virginia, and appropriate legislation was introduced in January of 1968 to carry out this recommendation. At the time this brief is being written, the same has not yet been acted upon by the General Assembly of Virginia, but the Court will be advised prior to the argument of this case what action, if any, has been taken by the Virginia Legislature.

In Virginia the problem has been approached in the appropriate and proper manner. The Legislature has been asked to amend the applicable provisions of law to permit prisoners to attack sentences to be served in the future. It is appropriate that this procedure be followed and that the statute not be amended by judicial decree. Indeed, the Supreme Court of Appeals of Virginia has refused to do just this. It is far better to permit the prisoner to attack a sen-

tence to be served in the future as soon as possible after the conviction rather than to require him to wait many years, at which time he may be the only witness alive to testify as to what purportedly occurred. We, therefore, agree with the spirit of the decision of the Court below but not with the approach of amendment by judicial decree. It would be far better and proper for Congress to amend the statute permitting prisoners to attack sentences to be served in the future.

As hereinbefore pointed out, the issue before the Court is very narrow. The sole question is whether or not this Court will by judicial decree amend § 2254 of Title 28 U.S.C. to provide that state prisoners may attack in a federal court sentences to be served in the future. It is the position of the superintendent that this Court should not engage in such judicial legislation.

CONCLUSION

For the reasons stated, it is submitted that the judgments of the Court below should be reversed and that the decisions of the District Courts should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 1st day of February, 1968, I mailed a copy of the foregoing Brief by by first class mail to Mr. John J. Kirby, Jr., 4201 S. 31st Street, Apartment 808, Arlington, Virginia, and Mr. Thomas S. Currier, University of Virginia, School of Law, Charlottesville, Virginia, counsel for the respondents herein.

RENO S. HARP, III
Assistant Attorney General of Virginia

SUPREME COURT, U. S.

In the Supreme Court

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United States

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE

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BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The opinion below is the most recent of a series of decisions by the Fourth Circuit discarding the firmly established concepts limiting the scope of federal habeas review as announced by this Court in *McNally v. Hill,* 293 U.S. 136 (1934). *McNally* holds that a federal prisoner cannot attack on habeas corpus a sentence which he is not then serving. *McNally* also holds that habeas is not available to secure a judicial decision on a question which, even if determined in the petitioner's favor, will not result in his immediate release.

California's state prison and parolee population exceeds 36,750. Were *McNally* now to be overturned by this Court, some 45% of this number, imprisoned under consecutive or concurrent sentences, would be invited to petition for writs of habeas corpus to secure advisory opinions from federal district courts respecting the validity of state court convictions which are now beyond challenge. Our interest in upholding judgments rendered by our state courts and in avoiding superfluous litigation brings the People of the State of California before this Honorable Court as *amicus curiae.*

SUMMARY OF ARGUMENT

This case is controlled by *McNally v. Hill,* 293 U.S. 136 (1934), and subsequent decisions of the Court reaffirming the principle that the writ of habeas corpus is available only to attack a sentence presently being served, and only when a successful attack will accomplish immediate release.

The decision below radically departs from the common law tradition of the writ. As recently as 1959, in *Heflin v. United States,* 358 U.S. 415 (1959), the Court, recognizing the continued vitality of that tradition applied the custodial requirement announced in *McNally* to the federal resentencing statute, 28 U.S.C. § 2255.

The Supreme Court has always recognized that Congress has full authority to regulate the scope and procedure of the writ. Congress has exercised that power in 28 U.S.C. § 2241, imposing a requirement that a petitioner must be presently held in custody under the sentence which he would attack. The decision below denies the language of the statute its long-accepted and intended meaning.

McNally is founded upon sound public policies: federal nonintervention into the orderly administration of justice by the states; avoidance of premature constitutional claims on grounds of nonjusticiability; reduction of the burden upon the federal courts by elimination of claims which may never need to be heard and which may require opinions which are advisory.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT EXPLICITLY REJECTS THE CONTROLLING PRECEDENT OF THIS COURT, IS CONTRARY TO NUMEROUS OTHER DECISIONS BY THIS COURT, ABANDONS THE HISTORIC COMMON LAW CONCEPT OF THE WRIT OF HABEAS CORPUS, EXCEEDS THE JURISDICTION CONFERRED BY THE CONTROLLING STATUTE AND IS CONTRARY TO SOUND PUBLIC POLICY. THE DECISION BELOW SHOULD BE REVERSED.

A. The decision rendered by the Court of Appeals for the Fourth Circuit explicitly rejects McNally v. Hill, the controlling precedent of this Court.

This is, of course, not a case of first impression. The precise question was before this Court in *McNally v. Hill,* 293 U.S. 136 (1934). There a federal prisoner sought to attack collaterally a consecutive sentence which he had not begun to serve. McNally urged that if he could overturn his future sentence he would be eligible for parole on his current term. The Court held that the writ of habeas corpus was not available for his purpose.

> "Such use of the writ in the federal courts is without the support of history or of any language in the statutes. . . . Without restraint of liberty, the writ will not issue. . . . A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." *Id.* at 138.

McNally was reaffirmed in *Holiday v. Johnston,* 313 U.S. 342 (1941), in *Darr v. Burford,* 339 U.S. 200, 203 (1950), in *Parker v. Ellis,* 362 U.S. 574, 575 (1960), and most recently in *Fay v. Noia,* 372 U.S. 391, 427 n. 38 (1963).

The decisions of the United States Courts of Appeals, save for the Fourth Circuit, witness the present vitality of the *McNally* doctrine. *McNally* has been followed by the First Circuit, *Allen v. United States,* 349 F.2d 362 (1st Cir. 1965), the Second Circuit, *United States ex rel. Smith v. Martin,* 239 F.2d 530 (2d Cir. 1956), *United States v. McGann,* 245 F.2d 670 (2d Cir. 1957), the Third Circuit, *Palumbo v. New Jersey,* 334 F.2d 524 (3d Cir. 1964), the Fifth Circuit, *Brown v. Beto,* 377 F.2d 950 (5th Cir. 1967), *Young v. United States,* 337 F.2d 753 (5th Cir. 1964), the Sixth Circuit, *Lowther v. Maxwell,* 347 F.2d 941 (6th Cir.), *cert. denied,* 382 U.S. 881 (1965), the Seventh Circuit, *Postelwait v. Markley,* 342 F.2d 677 (7th Cir. 1965), the Eighth Circuit, *Burnside v. Nebraska,* 378 F.2d 915 (8th Cir. 1967), the Ninth Circuit, *Barquera v. California,* 374 F.2d 177 (9th Cir. 1967), *Crow v. United States,* 186 F.2d 704 (9th Cir. 1950), the Tenth Circuit, *Carpenter v. Crouse,* 358 F.2d 701 (10th Cir. 1966), and by the District of Columbia, *Moon v. United States,* 272 F.2d 530 (D.C. Civ. 1959), *Thomas v. United States,* 271 F.2d 500 (D.C. Cir. 1959).

Nevertheless, unhappy with *McNally,* the Fourth Circuit has rejected it. In *Martin v. Commonwealth,* 349 F.2d 781 (4th Cir. 1965), the Fourth Circuit faced the identical issue posed in *McNally.* It held that the custodial requirement of 28 U.S.C. § 2241 was met by an allegation that the petitioner's present right to be considered for parole was barred by a conviction sought to be vacated, even though the petitioner had not begun to serve the sentence attacked.

Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966), and *Williams v. Peyton,* 372 F.2d 216 (4th Cir. 1967), marked advances demanded by *Martin. Tucker* permitted a state prisoner to attack a prior sentence fully served in order to advance his current valid recidivist sentence, although he had not served sufficient time to satisfy the concededly valid portion of the current term. If Tucker prevailed, the court said, he would be entitled to immediate release. *Williams* made federal habeas corpus available to a state prisoner already eligible for parole on a sentence which he did not challenge, but whose chances for parole were "manifestly restricted" by the fact of other convictions and unserved sentences thereon, allegedly invalid.

Rowe v. Peyton, 383 F.2d 709 (4th Cir. 1967), simply realized the potential of *Martin v. Commonwealth.* Finally, in *Rowe,* the Fourth Circuit concluded that "the writ is available to attack any sentence, service of which will be required in the future by the same custodian who presently detains the prisoner." *Id.* at 717.

Aided by its unique interpretation of *Jones v. Cunningham,* 371 U.S. 236 (1963), and *Fay v. Noia,* 372 U.S. 391 (1963), the Fourth Circuit has concluded that *McNally* no longer is the law of the land. *Rowe v. Peyton, supra,* 714. In our view, *Rowe* and its progenitors are inconsistent with numerous decisions of this Court, including those from which they would draw support.

B. The opinion of the Court of Appeals is inconsistent with other decisions of this Court.

In addition to rejecting the doctrine formulated in *McNally,* applied in *Holiday v. Johnston,* and approved in *Darr v. Burford,* in *Parker v. Ellis,* and again in *Fay v. Noia, Rowe* is inconsistent with this Court's decision in *Heflin v. United States,* 358 U.S. 415 (1959). In a footnote to its opinion the Fourth Circuit quietly concedes that this 1959 decision "may be regarded as an affirmation of *McNally v. Hill. . . .*" *Rowe v. Peyton,* 715 n. 21. The difficulty, then, is not that "Since McNally v. Hill the Supreme Court has not dealt directly with the problem . . .," *Id.* at 715, but the Fourth Circuit's belief that this Court has dealt with it incorrectly.

In 1948, Congress enacted 28 U.S.C. § 2255, authorizing federal prisoners to petition for release or resentencing. The "sole purpose" of this statute was "to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum." *Hayman v. United States,* 342 U.S. 205, 219 (1952). (Emphasis supplied.) To proceed under section 2255, a prisoner must be "in custody." *Crow v. United States,* 186 F.2d 704 (9th Cir. 1950). See *Parker v. Ellis, supra.* The custodial requirement established in 28 U.S.C. § 2255 is identical with that in 28 U.S.C. § 2241. *Allen v. United States,* 349 F.2d 362 (1st Cir. 1965); *United States v. Bradford,* 194 F.2d 197 (2d Cir.), *cert. denied,* 343 U.S. 979 (1952).

In *Heflin* this Court held that a federal prisoner may not, under section 2255, attack a sentence which he is not serving. A majority specifically reaffirmed *McNally*. *Heflin v. United States*, 421. (Concurring opinion of Mr. Justice Stewart.)[1] *Heflin* and *McNally* stand or fall together.

Rowe and its precursors purport to find support in the Court's opinions in *Jones v. Cunningham, supra*, and in *Fay v. Noia, supra*. *Jones* and *Fay* are interpreted to signal a new era of continued growth for the Great Writ.

Jones held only that the restrictive conditions incident to parole[2] satisfy the "in custody" requirement of section 2241, so as to confer habeas corpus jurisdiction upon a district court. Parole status so greatly curtails personal freedom that parole is but an extension of the prison walls. The parolee remains in *constructive custody*. See *Hoptowit v. United States*, 274 F.2d 936 (9th Cir. 1960). Thus, in permitting a parolee to apply for the writ, this Court did not depart from the historic principle that the writ may issue only to secure the petitioner's release from custody. *Fay v. Noia, supra*.

Jones does not support *Rowe; Fay v. Noia* undermines it. *Fay*, decided after *Jones*, reminds us that

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[1]We recognize that in both *Heflin* and *McNally* federal prisoners denied relief had alternate routes to the federal courts. See *Arketa v. Wilson*, 373 F.2d 582, 584 (9th Cir. 1967). It is equally clear, however, that the Court did not rest its decisions upon this basis. Moreover, by its recent enactment of 28 U.S.C. § 2254(d), Congress has said that state courts are satisfactory forums for vindicating constitutional rights. State and federal prisoners stand on the same footing.

[2]*Id.* at 237, 241-242.

> "custody in the sense of restraint of liberty is a prerequisite to habeas, for the only remedy that can be granted on habeas is some form of discharge from custody. McNally v. Hill. . . ." *Id.* at 427, n. 38.

Rowe, fastening upon broad language in *Jones* and in *Fay,* ignores this specific statement.[3] It is plain that the Fourth Circuit has prematurely interred *McNally* and is no less anxious to dispatch *Heflin* and *Parker.* See *Cruz v. United States,* 368 F.2d 783 (4th Cir. 1966).

C. The decision of the Court of Appeals departs from the common law tradition of the writ.

Neither the Constitution nor the statute fully defines the term "habeas corpus." To ascertain its meaning and appropriate use, "recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute." *McNally v. Hill, supra,* 136.

We have demonstrated that the Court of Appeals has refused to follow the controlling decisions of this Court. The Fourth Circuit frankly states that its approach also represents

> "a significant departure from the historic conception that the writ of habeas corpus was avail-

[3] *Jones* and *Fay* are easily distinguished from the Fourth Circuit's decisions on the basis of prematurity, or mootness. *Jones* and *Fay* were single sentence cases in which habeas corpus could produce immediate release from custody.

able only if the court's order would procure the immediate release of the prisoner." *Rowe v. Peyton, supra,* 715.

The Court of Appeals concluded that the passage of time has diminished the relevance of the common law as a guide for defining the scope of the writ. The extension of the writ to secure federal review of constitutional claims arising from state trials,[4] the modification of the exhaustion doctrine,[5] and recently expanded concepts of due process and equal protection work in combination with the result that our state prisons contain many inmates anxious to assert constitutional rights recognized subsequent to their convictions. The problem, according to the Fourth Circuit, is to fashion a remedy for their rights. See *Rowe v. Peyton, supra,* 713. "The problem we face simply did not exist in the Seventeenth Century," *Ibid.,* nor did it become acute until after *McNally* was decided. *Id.* at 714.

This difficulty is much alleviated by the availability of state habeas corpus and by the fact that newly cognized rights increasingly are denied retroactive application. See *Linkletter v. Walker,* 381 U.S. 618 (1965); *Tehan v. Shott,* 382 U.S. 406 (1966); *Johnson v. New Jersey,* 384 U.S. 719 (1966); *Stovall v. Denno,* 388 U.S. 293 (1967). There are, of course, sound policy reasons for retaining *McNally* even in the face of new problems. These factors we shall enumerate within. But we must first challenge the statement of

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[4]Act of Feb. 5, 1867; *Brown v. Allen,* 344 U.S. 443 (1953).

[5]*Fay v. Noia,* 372 U.S. 391 (1963).

the Court of Appeals that the *McNally* principle must be regarded as obsolete because it was not formulated in the context of present-day problems.

In 1959, in *Heflin v. United States, supra,* this Court held that a federal prisoner could not, under 28 U.S.C. § 2255, attack a sentence he was not serving. *Hayman v. United States, supra,* had previously held that section 2255 afforded federal prisoners the same rights secured to state prisoners by section 2241. *Heflin,* in effect, reaffirmed *McNally. Rowe v. Peyton, supra,* 714, n. 21.

Rights extended to defendants in state criminal trials within this decade were guaranteed in federal courts long before 1959. Compare, *e.g., Mapp v. Ohio,* 367 U.S. 643 (1961), with *Weeks v. United States,* 232 U.S. 383 (1914), and *Gideon v. Wainwright,* 372 U.S. 335 (1963), with *Johnson v. Zerbst,* 304 U.S. 458 (1938). *Heflin* thus was decided in a context precisely analogous to that of *Rowe.* The Court nevertheless adhered to the common law principle that the writ will issue only to secure the petitioner's immediate release. Whether for reasons of policy, or out of regard for the limitations of the statute, this Court has faced the problem posed in *Rowe* and concluded that the Freedom Writ, as the name implies, operates to restore immediate freedom, not to secure advisory opinions.

D. The scope of the writ is regulated by statute. One who attacks a sentence under circumstances which will not secure his immediate release is not "in custody" within the meaning of 28 U.S.C. § 2241.

28 U.S.C. § 2241 provides that

> "(c) The writ of habeas corpus shall not extend to a prisoner unless— * * * (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . ."

This Court has always recognized that Congress has full authority to regulate the scope and procedure of the writ. Article I, section 9 of the Constitution guarantees only that the common law right to the writ, as it was understood in 1789,

> "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The Suspension Clause is cast in negative terms. Federal courts are empowered to grant the writ only by implication of the Constitution. Therefore, as Chief Justice Marshall said,

> "[T]he power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman,* 4 Cranch 75, 94 (U.S. 1807).

This Court has faithfully adhered to the view expressed in *Bollman. Ex parte McCardle,* 7 Wall. 506 (U.S. 1868); *Whitney v. Dick,* 202 U.S. 132 (1906); *Adams v. United States ex rel. McGann,* 317 U.S. 269, 273 (1942); *Darr v. Burford,* 339 U.S. 200, 210-214 (1950); *Brown v. Allen,* 344 U.S. 443, 448, 500

(1953). *Cf. Johnson v. Zerbst,* 304 U.S. 458 (1938); *Hayman v. United States,* 342 U.S. 205, 211 (1952).

As noted earlier,

> "The statute does not define the term *habeas corpus.* To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use *when authorized by statute." McNally v. Hill, supra,* 136. (Emphasis ours.)

The Supreme Court has looked to the common law only to supply that meaning to the terms of the statute which may fairly be said to have been intended by Congress. Contrary to the opinion of the Fourth Circuit, the writ of habeas corpus *is* a creature of statute and not the product of judicial innovation. See *Rowe v. Peyton, supra,* 715. The progress of the Great Writ from a limited jurisdictional concept to a constitutional remedy marks the judicial realization of the growth of the habeas corpus statute. Development at every stage has occurred within the limits and intendments of the existing statute.

When the Congress, in aid of the Reconstruction Acts,[6] passed the Act of February 5, 1867, it extended the scope of the writ to all cases where persons were restrained of their liberty in violation of the federal Constitution, federal laws, or federal treaties. *Frank*

[6] See 2 Warren, The Supreme Court in United States History, 464-482 (rev. ed. 1937).

v. Mangum, 327 U.S. 309 (1915). The principle that final judgments may be reopened on collateral attack was not established until 1953, in the landmark decision, *Brown v. Allen,* 344 U.S. 443 (1953). However, the holding of *Brown* was not the product of judicial innovation, but was reached under the compulsion of the habeas corpus statute. In one of two opinions written for the Court, Mr. Justice Frankfurter said of the Act of 1867,

> "It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims." *Brown v. Allen, supra,* 500.

There can be no doubt that by including the words "in custody" in section 2241, Congress intended to perpetuate the common law requirement that a prisoner must be in custody under the sentence which he seeks to attack. In 1934, *McNally* held that the custodial requirement of the existing habeas corpus statute foreclosed collateral attack upon a future sentence. *McNally* was the law in 1948, when the present habeas statute was enacted. *Heflin v. United States,* decided in 1959, confirms that the 1948 enactment preserves the "in custody" requirement as it was declared in *McNally.* See *Rowe v. Peyton, supra,* 714, n. 21.

While the Fourth Circuit conceded that it was departing from the common law requirement of custody, it attempted to bring its decision into harmony with

the statute. *Rowe* held that state prisoners under consecutive terms are detained for the service of present and subsequent sentences alike and are, therefore, "in custody" under all sentences within the meaning of the statute. This, the court said, was a "reasonable interpretation of the custodial language of the statute. . . ." *Id.* at 714. We earnestly disagree.

No interpretation is reasonable which does not comport with the legislative intent. The Fourth Circuit's interpretation does not meet this requirement. *Rowe* denies the statutory language its historic and intended meaning, the meaning ascribed to it by this Court and by ten United States Courts of Appeals.

The custodial requirement of section 2241 is identical with that of section 2255. *Allen v. United States, supra; United States v. Bradford, supra.* Section 2255 makes relief available to a prisoner "in custody . . . claiming the right to be released. . . ." From this we must infer that the words "in custody" in section 2241 embrace the historic limitation upon the offices of the writ: it will issue only to secure the petitioner's release from custody. *Rowe* deletes from section 2241 the implied terms "claiming the right to be released."

These words of Mr. Justice Stewart, concurring in *Heflin v. United States,* would have provided sure guidance below:

> "I think it clear that a motion for relief under 28 U.S.C. § 2255 [here § 2241] is available to attack a sentence under which a prisoner is in custody. That is what the statute says. That is what the legislative history shows. That is what

the federal courts, faced almost daily with the statute's application have unanimously concluded. Personal notions as to the kind of a post-conviction statute that Congress might have enacted or should enact are, of course, entirely irrelevant to the inquiry." 358 U.S. 415, 420. "There is not one word to indicate any intent to alter the basic principle of habeas corpus that relief is available only to one entitled to be released from custody." *Id.* at 421.

E. This Court should once more reaffirm McNally v. Hill.

The custodial requirement of the habeas corpus statute is no mere vestige of the Great Writ; it implements vital public policies.

Federal courts traditionally have refused to tax the delicate federal-state relationship by overturning state court judgments upheld by state reviewing courts in order to render an opinion which may be advisory. See *e.g., McNally v. Hill, supra,* and *Parker v. Ellis, supra.* This reluctance becomes increasingly appropriate as more states provide forums for collateral attack.[7] Expanding concepts of due process together with the increasing invocation of the writ have opened wide the door to a conflict between state and federal authorities.[8] Thus, the policy of federal

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[7]See, *e.g., In re Chapman,* 43 Cal.2d 385, 273 P.2d 817 (1954); *People ex rel. Prosser v. Martin,* 208 Misc. 875, 148 N.Y.S.2d 472 (1952); Ore. Rev. Stats. §§138.510, 138.560, 138.570; *Simon v. Director,* 235 Md. 626, 201 A.2d 371 (1964); *Commonwealth ex rel. Stevens v. Myers,* 419 Pa. 1, 213 A.2d 613 (1965); *State v. Losieau,* ..... Neb. ....., 144 N.W.2d 435 (1966); *State ex rel. Holm v. Tahash,* 272 Minn. 466, 139 N.W.2d 161 (1965).

[8]*Cf. Darr v. Burford,* 339 U.S. 200, 219, 221 (1950), (dissenting opinion of Mr. Justice Frankfurter).

nonintervention into the orderly processes of a state's administration of criminal justice grows in significance.

With a view toward reducing increased tensions placed upon federal-state relations by federal review of state judgments, Congress has recently enacted 28 U.S.C. § 2254(d). This statute makes clear that the Congress regards state courts as trustworthy guardians of federal constitutional rights. Section 2254(d) expresses a preference for litigating constitutional questions in state courts. We urge this Court, consistent with this policy of federal nonintervention, to uphold the "in custody" requirement of section 2241.

The number of petitions for federal habeas corpus ever increases. In 1941, state prisoners filed 134 petitions. By 1965, the number of applications had grown to 4,845. More than 95 percent of these petitions were found to be without merit.[9] Federal prisoners are no less energetic in asserting frivolous claims. See Goodman, *Use and Abuse of the Writ of Habeas Corpus,* 7 F.R.D. 313 (1948). As this burden upon the federal district courts grows to the point where there is insufficient time to ferret out from a mountain of claims, many of them obscurely stated, the relatively few meritorious petitions, the *McNally* doctrine is an increasingly invaluable tool for screening out claims which are invariably frivolous and which may never assume practical significance.

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[9]United States Senate Report No. 1797, Judiciary Committee, Oct. 18, 1966.

The custody requirement of sections 2241 and 2255, as recognized in *McNally, Hayman,* and *Heflin,* expresses a policy of nonjusticiability. It is long-established that this Court, as final arbiter, will, when possible, avoid resolving constitutional dilemmas. See, *e.g., Poe v. Ullman,* 367 U.S. 497 (1960), and *Epton v. New York,* 36 U.S. Law Week 3296 (1968), concurring opinion of Mr. Justice Stewart. The *McNally* doctrine avoids the premature assertion of claims of constitutional error just as the rule of *Parker v. Ellis* forecloses moot claims. In our view, prematurity and mootness are sides of the same coin.

Indeed, the statutory rule requiring that a petitioner be "in custody" closely parallels the constitutional rule confining the adjudicatory power of this Court to actual cases or controversies.[10] In given circumstances the rules may touch. It is doubtful, for example, that a prisoner presents a justiciable case or controversy when he attacks but one of several sentences or attacks a sentence which is to commence in the future.

The claims of Rowe and Thacker may never need to be heard. Before they commence their consecutive sentences they may die, be pardoned, or abandon their claim because they receive parole. The futility of airing premature claims is perhaps best seen in the case of a prisoner who attacks a concurrent sentence which expires on or before the expiration date of a remaining valid sentence. Even if successful he does not win freedom, but remains in prison to serve his

[10]U.S. Const. art. III, § 2.

additional terms. The Fourth Circuit, in *Williams v. Peyton, supra,* suggested that the writ will issue because the mere fact of a conviction impairs the inmate's chances for parole. In our view, there is no warrant for finding in eligibility for parole a satisfaction of the release from custody requirement. Federal courts would then be doing no more than directing states to grant petitioners parole consideration. A prisoner does not alter his own character or remove from his record prior anti-social conduct by demonstrating the constitutional infirmity of one of his convictions. Parole authorities release prisoners on the basis of their present character as it appears in light of their past actions, not on the basis of their legal acumen.[11] Overruling *McNally* would encourage federal and state prisoners to pursue the writ in order to litigate academic questions. An inmate who overturns a sentence in a court which cannot order his release has not gained freedom but has succeeded only in winning an advisory opinion and diverting judicial energies from necessary tasks.

If *McNally* is overruled, the federal district courts will be inundated by a predictable flood of habeas corpus petitions. We have reviewed a cross-section of the records of 36,750 state prisoners and parolees.[12]

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[11]See Comments of Mr. Fred Dickson, Chairman, California Adult Authority, Proceedings of the First Sentencing Institute for Superior Court Judges, 45 Cal.Rptr. Appendix (1965), commencing at page 99.

[12]The study included California's 36,750 adult male felons only. Two separate random samplings of prisoner records were made by the California Bureau of Criminal Statistics. Each sampling consisted of 1,000 records. The similarity of results in both cases indicates a high reliability factor.

Our study reveals that approximately 45 percent are committed under consecutive or concurrent sentences. There is little reason to believe that this percentage would differ substantially in other states or in the federal sphere. Voiding *McNally* would mean that more than 16,000 state prisoners would become eligible to petition for federal habeas corpus in California. While this figure is impressive, conceivably the problem might be greater in other states which, unlike California, have not permitted collateral attack on matters relating to no more than conditions of confinement. Moreover, the persistence regularly displayed by habeas petitioners allows little room for the belief that prior rejection by state courts will discourage a prisoner from renewing his claim in the federal courts.

This Court has taken cognizance of the grave consequences for the administration of justice which attach to the recognition of a new constitutional right. Such consideration increasingly has led to denial of retroactive application of newly acknowledged rights. We do not ask the Court forever to foreclose the constitutional claims of state and federal prisoners. We do urge that, in a time of expanding concepts of due process and equal protection, the continued orderly administration of justice compels reaffirmation of the principle that the writ of habeas corpus lies only to restore immediate freedom. The Great Writ never should become a device by which premature claims are resolved in advisory opinions.

CONCLUSION

For the stated reasons, the People of the State of California respectfully urge that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 802

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,

Petitioner,

—v.—

ROBERT ELMER ROWE and CLYDE MASON THACKER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

THOMAS S. CURRIER
JOHN J. KIRBY, JR.

University of Virginia
School of Law
Charlottesville, Virginia

March, 1968

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Howard v. *Smyth*, 365 F.2d 428 (4th Cir.), *cert. denied*, 385 U.S. 988 (1966) 21
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McNally v. *Hill*, 293 U.S. 131 (1934) .....*passim*
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State v. *Losieau*, 180 Neb. 696, 144 N.W. 2d 435 (1966) 68

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American Bar Association Project on Minimum Standards for Criminal Justice, *Sentencing Alternatives and Procedures* (Tent. Draft 1967) ..72, 73
American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Post-Conviction Remedies* (Tent. Draft 1967) 17, 18, 51, 52
American Correctional Association, *Manual of Correctional Standards* 262 (1954) 22
Borchard, *Declaratory Judgments* 299 (2d ed. 1941) 66
Cong. Globe, 39th Cong., 1st Sess. 4151 (1867) 36
Division of Corrections, Virginia Department of Welfare and Institutions, *Classification in the Virginia Penal System* (1950) 21
Glasser, *The Effectiveness of a Prison and Parole System,* ch. 4 (1964) 24
Johnson, *Crime, Correction, and Society* 523 (1964) 23, 25
Korn and McCorkle, *Criminology and Penology* 479 (1959) 23
Loveland, *Classification in the Prison System,* in *The Sociology of Punishment and Correction* 189 (1962) 20, 21
Loving, Stockwell, and Dobbins, *Characteristics of Escapees,* in *The Sociology of Punishment and Correction* 144 (1962) 21
President's Commission on Law Enforcement and the Administration of Justice, *Task Force: Corrections* (1967) 73
President's Commission on Law Enforcement and the Administration of Justice, *Task Force: The Courts* (1967) 16-17
Richmond, *Prison Profiles* 14 (1965) 22
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United States Dept. of Justice, *National Prisoner Statistics* 12 (1966) 71

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LAW REVIEWS:

Farber, *Suffering and Time Perspective of the Prisoner,* 20 University of Iowa Studies in Child Welfare 155 (1944) 25
Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems,* 6 Vand. L. Rev. 79 (1952) 62
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 802

C. C. PEYTON, Superintendent of the
Virginia State Penitentiary,

Petitioner,

—v.—

ROBERT ELMER ROWE and CLYDE MASON THACKER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Question Presented

A state prisoner is incarcerated under consecutive sentences. He has alleged facts which, if true, render one of his convictions unconstitutional. The conviction attacked adversely affects his treatment in prison, and evidence to prove his allegations is disappearing with the passage of time. According to a state administrative rule for deter-

mining the order of sentence service, he has not yet begun serving the sentence based upon the attacked conviction, and therefore no state remedy is available. Is he presently entitled to a federal hearing and adjudication upon his claim?

Statute Involved

The statute involved in this case is 28 U.S.C. § 2241 (1964), which is set forth in the Appendix to this brief. 28 U.S.C. § 2254, set forth in Brief for Petitioner, 3, is not involved in this case.

Statement

C. C. Peyton v. *Robert Elmer Rowe*

Robert Rowe was tried on May 20, 1963 for rape in Staunton, Virginia. On June 18, 1963 he was sentenced to thirty years in prison for that offense. Three days later he was brought before the Circuit Court in the adjoining City of Waynesboro, Virginia to be tried on an indictment for feloniously abducting a female with intent to defile her. This charge arose from the same incident and involved the same complainant. On June 24, 1963, the court heard and dismissed a plea of former jeopardy. Rowe's counsel then advised him to plead guilty since any "sentence imposed would have to be run concurrent" (R. I, 6) with the sentence imposed six days earlier for rape. Acting upon this advice Rowe pleaded guilty to the abduction charge. The court then sentenced him to twenty years in the penitentiary to be served consecutively. No appeal was taken. The aggregate sentence imposed on Rowe was thus fifty years.

He will commence service of the second sentence in 1993. (A. 9) If he receives the full good-time credit on his first sentence, he will begin service of the second sentence in September, 1982. (R. I, 37). He will become eligible for parole in November 1974 (R. I, 36). If the second sentence were to be declared invalid, he would be eligible for parole in late 1970 or early 1971 (A. 9). Rowe will be thirty-one years old this month.

Rowe's claims of double jeopardy, involuntary guilty plea, defective indictment and ineffective representation based on this second trial (R. I, 6) were rejected without a hearing on April 27, 1966, by the Supreme Court of Appeals of Virginia, to which he had applied for a writ of habeas corpus (A. 1). The court's order was premised on his nonservice of the attacked second sentence:

> [T]he petitioner is not now detained in pursuance to the judgment of which he complains, and the writ of habeas corpus lies only to attack the validity of petitioner's present detention.

(A. 1).

The United States District Court for the Western District of Virginia denied Rowe's petition for a writ of habeas corpus on October 26, 1966 on the ground of prematurity, citing *McNally* v. *Hill,* 293 U.S. 131 (1934). (A. 3).

Rowe contended in both courts that there was jurisdiction to hear his claim that the second judgment entered six days after the sentence for rape was unconstitutional. (R. I, 16, 28). "Should your petitioner have to wait for such a term that all means of proof of unrecorded matters of fact in former judicial proceedings are unavailable?" (R. I, 18). When the Supreme Court of Appeals of Virginia answered this question in the affirmative, Rowe argued in the federal

District Court that he had been denied due process by Virginia's failure "to afford some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." (R. I, 7).

The United States Court of Appeals for the Fourth Circuit granted a certificate of probable cause, appointed counsel and consolidated the case for briefing and argument with *Thacker* v. *Peyton*. The cases were heard by an *en banc* court. Unanimously, on August 28, 1967, the Fourth Circuit reversed the district courts and remanded for the hearings on the merits which Virginia conceded were required by the allegations.

Virginia's petition for certiorari was granted on January 17, 1968 and the case was set down for argument by this Court after No. 71. Virginia concedes that if the remedy of habeas corpus is available both prisoners are entitled to plenary hearings and raises no question of exhaustion of state remedies. (Brief for Petitioner, 6, 7).

C. C. Peyton v. *Clyde Mason Thacker*

Clyde Thacker was committed to the Virginia State Penitentiary on November 13, 1964, (R. III, 2), to serve a number of sentences totalling sixty years, four months and sixteen days. (R. III, 4). With credit for good time Thacker is due to be released on November 8, 2004. (R. III, 4). Since every prisoner is eligible for parole after twelve years if one-fourth of his term is in excess of that time, VA. CODE ANN. § 53-251 (1967), he will become eligible for parole on August 7, 1976. (R. III, 2). The three sentences which he seeks to attack were imposed at the same time in 1953. Their invalidation would not make him eligible for parole nor advance his parole eligibility date. These sentences

are scheduled to run from July 8, 1994 to July 8, 2004. If he does not receive good-time credit, the sentences will begin in 2009 and run to 2024. (R. III, 4). Thacker is now thirty-eight years old.

The offenses for which these three sentences were imposed took place in 1950, 1951 and 1952. (R. III, 7). Thacker was indicted on three separate counts of housebreaking by a grand jury in Hanover County, Virginia, and arrest warrants dated July 6, 1952, (R. III, 17), were issued on two of the offenses. The record does not reveal when the warrants were served, but there is in the record a presentence report on Thacker relating to other offenses, dated June 20, 1952, which indicated that Thacker was in custody at least at that point. (R. III, 15). A later presentence report, dated September 18, 1953, and filed in the Hanover County Circuit Court on November 16, 1953, showed that as of May, 1953, Thacker had been in prison long enough for a fairly detailed prison progress report to be filed. (R. III, 7). The presentence reports also show that Thacker left school at the age of sixteen, when he was still in the third grade, since he said he was unable to learn and had to go to work. (R. III, 13).

Counsel was appointed to represent Thacker on the three housebreaking charges which he seeks to attack on June 24, 1953. (R. II, 10). Thacker pleaded guilty to the three charges on the same day on the advice of his counsel. Counsel, whose name Thacker does not remember, advised him to plead guilty "since it would eliminate the necessity of subpoenaing defense witnesses and, also, would save the court the expenses involved in a costly trial—and that it wouldn't make much difference since your petitioner was already under other sentences from other courts." (R. II,

10). Counsel advised Thacker that the sentences would be suspended.

Three consecutive five-year sentences were imposed on November 16, 1953. The court then suspended "execution of sentence in this case for 50 years upon the condition that he be of good behavior while he is in the State Penitentiary serving a sentence imposed on him by another Court and upon the further condition that he be of good behavior, after he is released from the Penitentiary, and not violate any of the laws of this Commonwealth during the term of his probation." Thacker only saw his court-appointed counsel twice—on the day of his trial, June 24, 1953 and the day of sentencing, November 16, 1953.

On March 19, 1956, the suspension of the three five-year sentences was revoked at a hearing at which Thacker was not represented by counsel.

Thacker did not seek state habeas corpus to attack these sentences. He states in his petition to the United States District Court for the Eastern District of Virginia that he "has been advised that he cannot attack these sentences in the courts of the Commonwealth until he starts serving them (July 9, 1994)." (R. II, 10). In response to Superintendent Peyton's answer, Thacker further stated:

> This Honorable Court surely is aware that—to quote the respondent's words in a similar case filed by petitioner in the Supreme Court of Appeals of Virginia—"In Virginia, the writ of habeas corpus cannot be used to attack a sentence to be served in the future. See *Peyton* v. *Williams,* 206 Va. 595—1965."

(R. II, 16).

The federal district judge did not base his February 1, 1967 denial of the writ on Thacker's alleged failure to

exhaust state remedies, but on the fact that Thacker was not serving the sentences and they did not affect his parole eligibility. (A. 6).

In a memorandum filed in the Fourth Circuit Thacker said:

> (3) If there is any equality in the law—if there is any substance to the Constitutional phrase "EQUAL PROTECTION OF THE LAW"—if there is such a thing as HONEST JUSTICE—then, surely, the United States Government should not allow the Commonwealth of Virginia to sentence your appellant, nor anyone else, illegally and unconstitutionally, to a term to begin in July, 1994, without providing some method for attacking the validity of such sentences until July, 1994. In essence, that is exactly what the Honorable Judge John D. Butzner, Jr., stated in his ORDER dated February 1, 1967: "FOR REASONS STATED IN THE MEMORANDUM OF THE COURT THIS DAY FILED, IT IS ADJUDGED AND ORDERED THAT THE WRIT OF HABEAS CORPUS IS DENIED AND THE PETITION IS DISMISSED WITHOUT PREJUDICE TO PETITIONER'S REAPPLICATION AT THE PROPER TIME."
>
> According to that MEMORANDUM, the PROPER TIME would be on or about July 9, 1994.
>
> This is not only unjust. It is RIDICULOUS! It is repugnant to the American concept of JUSTICE. Would it be legal and just for a doctor to deny treatment of syphilis to a patient until 1994 merely because the patient also had tuberculosis and the doctor estimates it would take until 1994 to cure the tuberculosis? The same principle applies here.
>
> Your appellant contends there is nothing in the United States Constitution and the Bill of Rights

> whereby any State is given the authority to impose a sentence upon a person, such sentence to start twenty-seven years in the future, or even two years in the future, without providing some method for testing the legality and validity of the sentence. Although this practice is quite common in the Courts of the Commonwealth of Virginia, wherein sentences cannot be attacked by habeas corpus, it always has been common opinion that such sentences could attacked by habeas corpus in the federal Courts. Here the Honorable Judge John D. Butzner, Jr., ruled to the contrary.

(R. IV, 43, 44).

Virginia does not allege here that Thacker has not exhausted his state remedies and concedes that his allegations demonstrate that he is entitled to a hearing. (Brief for Petitioner, 6, 7).

Summary of Argument

Rowe and Thacker are in prison. They assert that sentences imposed upon them in 1963 and 1953, respectively, are unconstitutional and the Commonwealth agrees that their allegations are such as to entitle them to a hearing in federal court. The Commonwealth asserts the right to treat these sentences as valid for all purposes, including the determination of prison treatment, the computation of parole eligibility, and the requirement of actual service. Establishing the invalidity of these sentences necessitates a fact-finding determination. *McNally* v. *Hill,* which requires postponement of this fact-finding hearing and determination until after 1990 for each man, incorrectly held that a sentence scheduled for future service cannot be an

intolerable restraint within the reach of habeas corpus. The Great Writ then and now is not a narrow, static formalistic remedy available only when complete discharge from all custody can be demanded, but a remedy for granting that form of discharge from custody which law and justice require. Even construed narrowly the Great Writ is available to secure an immediate adjudication that the state's presently asserted right to continue confinement in the future is invalid. The Fourth Circuit therefore correctly ruled that the district courts, if they determine that Rowe's and Thacker's sentences are unconstitutional, may order the warden to expunge the sentences, to give no further effect to them, and to discharge Rowe and Thacker now and forever from any restraint flowing from them.

ARGUMENT

I.

Federal Habeas Corpus Should Be Available to a Prisoner in State Custody to Secure Discharge From the Present Burdens of Unconstitutionally Imposed Sentences Scheduled for Future Service, and a Present Adjudication That He Cannot Be Held for Actual Service of Them.

A. Rowe and Thacker Need a Present Determination of Their Allegations That Sentences Were Imposed Upon Them in Violation of the Constitution in Order to Insure That They Can Obtain a Full and Fair Fact-Finding Hearing.

Respondents Rowe and Thacker are in the Virginia State Penitentiary in Richmond, Virginia. They seek to attack sentences which they allege were imposed in violation of the Constitution of the United States. The Commonwealth of Virginia candidly concedes that their allegations are such

that each of them would be entitled to a hearing in a federal district court on the merits of his claim if he were presently serving one of the attacked sentences. However, Virginia correctly maintains that as long as *McNally* v. *Hill,* 293 U.S. 131 (1934) remains the law neither man will be eligible to have this federal[1] factual hearing until sometime in the last decade of the Twentieth Century when they actually began service of the prima facie unconstitutional sentences.

Resolution of the allegations of each respondent necessitates trial of issues of fact in the sense of *Townsend* v. *Sain,* 372 U.S. 293, 309 n. 6 (1963):

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators. . . . " *Brown* v. *Allen,* 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter).

Robert Rowe has alleged that after being tried for rape in Augusta County, he was placed on trial for abduction with intent to defile in Waynesboro and that upon the second trial his attorney, after unsuccessfully pleading double jeopardy, advised him to plead guilty to the abduction charge because "irregardless whether petitioner was convicted or not, the sentence imposed would *have to be run concurrent* with a prior sentence imposed by the Circuit Court of Augusta County for rape." (R. I, 6; emphasis added). This was a clear misstatement of Virginia law. See VA. CODE ANN. § 19.1-294 (1960); *Hudson* v. *Youell,* 179 Va. 442, 19 S.E.2d 705 (1942). In reliance on this ad-

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[1] Since Virginia presently follows its version of the *McNally* rule, no state post-conviction remedy will be available either. *Peyton* v. *Williams,* 206 Va. 595, 145 S. E. 2d 147 (1965); *Rowe* v. *Peyton,* A. 1-2 (1966).

vice, Rowe pleaded guilty, ignorant not merely of the fate which awaited him when the court gave him a twenty-year sentence to run consecutively with his prior sentence, but totally ignorant that there was any possibility he could receive such a sentence. If these allegations can be sustained, the entry of a conviction upon Rowe's guilty plea was a clear and grave denial of due process of law.

Normally a claim of ineffective representation by counsel is a very difficult one to make out. See, *e.g.*, *Turner* v. *Maryland*, 318 F.2d 852, 854 (4th Cir. 1963). But Robert Rowe has alleged his counsel was so ineffective that his very "assistance" created the conditions which long ago were held to render the entertainment of a guilty plea a deprivation of due process. It may be that Rowe will not be able to sustain these allegations. But as the Fourth Circuit's two decisions in *Turner* v. *Maryland*, 303 F.2d 507 (4th Cir. 1962), and 318 F.2d 852 (4th Cir. 1963), demonstrate, the issue of effective assistance of counsel is a complex factual question, and where substantial allegations are presented, the claim must be heard on the merits.

This clear need for a factual hearing to determine whether Rowe can sustain his allegations points up the urgent necessity that a present remedy be provided. The case turns almost entirely upon the exact nature of the advice his attorney gave Rowe prior to his guilty plea at his second trial. Twenty-five years from now, when Rowe enters upon his second sentence, the attorney who represented him may be dead; certainly his memory of the crucial conversation will not be rendered any sharper by the passage of time. Thus upon the availability of some present remedy depends not only Rowe's right to his freedom and the state's power to keep him in prison, but also

possible vindication of the reputation of a member of the bar. The case should be heard on its merits and it should be heard now, before it becomes too late.

Clyde Thacker has alleged that when he was tried in 1953 upon three indictments for housebreaking, a lawyer was appointed to represent him on the day of the trial. Thacker was then less than twenty-four years old, and had left school at the age of sixteen, having never finished the third grade. (R. III, 13). His court-assigned counsel advised him to plead guilty because it would save time and money all around and because "it wouldn't make much difference since your petitioner was already under other sentences from other courts," (R. II, 10), and because the attorney could get the sentences suspended. One component of Thacker's claim that the three resulting sentences are unconstitutional is that counsel was appointed to represent him on the same day he was tried. The Fourth Circuit has unequivocally condemned the "deplorable" but then apparently widespread practice in Virginia of appointing counsel for indigent persons accused of felonies too late to permit adequate investigation and trial preparation. These practices

> are inherently prejudicial, and a mere showing of them constitutes a *prima facie* case of denial of effective assistance of counsel, so that the burden of proving lack of prejudice is shifted to the state.

Twiford v. *Peyton*, 372 F.2d 670, 673 (4th Cir. 1967).

One factor which motivated the decision in *Twiford* was "an unnecessary and an unexplained delay between incarceration and the appointment of counsel [giving] rise to a substantial possibility of prejudice." *Ibid.* The record does not make it clear when Thacker was incarcerated, but his

prison record indicates that his first sentence was imposed in June, 1952 (R. III, 5), a full year before the trial in this case, and the presentence report refers to a detailed progress report filed by prison officials in May, 1953 (R. III, 15), so the inference is reasonably clear that Thacker was in the custody of the Commonwealth of Virginia for at least a year before his trial upon the three housebreaking charges. Yet counsel was not appointed until the day of the trial, which itself came more than two years after one of the alleged crimes. Counsel, without opportunity for investigation, testing the strength of the state's case, or trial preparation, advised an ignorant and unlettered youth to plead guilty. The Commonwealth's case against Thacker has never been developed before a trier of fact. Thacker could not judge his chances of success. His attorney had precious little time to do so. The Commonwealth may be able to show that Thacker was not prejudiced, but it should be required to bear its burden of proof in a full hearing upon the facts.

The claim of ineffective representation has another component. This Court has made it clear that an indigent is entitled to a lawyer who is an advocate in the fullest sense of the word. *Ellis* v. *United States,* 356 U.S. 674 (1958). Thacker's attorney told him to plead guilty, according to Thacker, because it would save the state the expense of a trial and because the convictions "wouldn't make much difference." Perhaps the attorney can defend the quality of his advocacy—or it may be that Thacker will be unable at a hearing to sustain his allegations—but it is hard to view such advice as the effective advocacy which due process demands. Only at a full hearing on the allegations in Thacker's petition can the facts be developed which will show whether the convictions may stand.

Once again this case demonstrates graphically the necessity that the factual hearing not be delayed any further. The evidence is already stale. Thacker was convicted almost fourteen years ago. He himself does not remember the name of his attorney, whom he saw only twice, on the day of the trial and later at the sentencing. In twenty-six years, when Thacker begins iron-bar service of these sentences, there is a substantial likelihood that it will be completely impossible for him to substantiate his allegations[2] or for the state to bear the burden of proof which Thacker's case, if proved, will place upon it. It would be pointless to require Clyde Thacker to wait in prison for twenty-six years while the very evidence which is crucial to the determination of his right to freedom disappears under the steady erosion of the passage of time. Even more obviously the Commonwealth can have no rational interest in watching the evidence necessary to rebut the pre-

[2] To support his allegation that counsel was appointed on the day of his trial, Thacker will, among other things, have to be able to produce evidence to resolve the potentially difficult question of the date of his trial. It is not clear whether he was tried and convicted on June 24, 1953 and sentenced on November 16, 1953 or both tried and sentenced on the later date. The court rolls seem to indicate that the trial date was November 16, 1953. (R. III, 22). However, Thacker has alleged that trial took place and he was found guilty on June 24. The presentence report also states that on June 24, "On his plea of guilty, subject was found guilty of housebreaking." (R. III, 7). Moreover, on motion of Thacker's counsel at this point, a presentence report was ordered prepared, a step which follows a finding of guilt under Virginia law. Va. Code Ann. § 53-278.1 (1967). The presentence report was filed on November 16, at which time the Circuit Court of Hanover County sentenced Thacker to three five-year prison terms, all of which were suspended for fifty years. The resolution of this factual issue of date of trial, which is crucial to at least one aspect of Thacker's constitutional claim, appears to rest on the memories of his counsel, the trial judge, various probation officers, and the court clerk. Whether even now he could prove his allegation is problematical. The passage of more years may render it impossible.

sumption of ineffective representation and, if Thacker prevails, to reconvict him of the offenses, vanish beyond recall.

Under the *McNally* rule, Rowe cannot petition for federal habeas corpus until 1993. Thacker is precluded by *McNally* from obtaining a federal hearing until 1994. Rowe and Thacker are faced with the inevitable prospect that they will have a much harder time a quarter of a century from now proving the factual claims upon which they base their assertions that they were unconstitutionally convicted.

This severe impairment of a prisoner's very ability to make out his case imposed by the needless delay in adjudication is a direct product of the *McNally* rule. A prisoner is rendered less able—perhaps totally unable—effectively to attack a conviction he alleges was imposed on him in violation of the Constitution because he must wait for years before he can bring a petition and secure a hearing. He must remain behind bars. He has no way of investigating his case. He has no means for conserving what evidence he does have. He cannot preserve the testimony, the memories, or even the lives of the witnesses upon whom he must depend for securing relief from an unconstitutional conviction.

As the Fourth Circuit pointed out in *Williams* v. *Peyton*, 372 F.2d 216, 220 (4th Cir. 1967), "delay may cause either the Commonwealth or the petitioner to forfeit the hearing (on habeas corpus) or retrial (of the substantive case) without regard to the merits of the case." Early litigation of constitutional claims in the post-conviction process "is to the benefit of all." *Ibid.* Perhaps the greatest beneficiary of early litigation is the state, for as the Supreme Court of Pennsylvania has put it:

> Eventually, . . . the heaviest detriment [flowing from the rule against attacking future sentences] comes to the Commonwealth. Upon a retrial, the Commonwealth has the traditional burden of proving the elements of its case beyond a reasonable doubt and meeting that burden obviously becomes more onerous ten or twenty years after the commission of the crime. To that extent time is not neutral but, rather, operates in such instances to the advantage of the accused.

Commonwealth ex rel. Stevens v. *Myers*, 419 Pa. 1, 15-16, 213 A.2d 613, 621-22 (1965).

The burden upon the federal judiciary of hearing post-conviction pleas from state prisoners is multiplied when stale cases must be litigated and constitutional claims decided on the basis of facts long buried by the passage of time. Nor can it be said that early litigation will increase the burden upon the federal courts by multiplying the number of times a given prisoner may petition for habeas corpus. The courts have always had discretion to refuse to entertain a second petition where justice would not be served. *Cf. Sanders* v. *United States*, 373 U.S. 1, 15 (1963). The Habeas Corpus Act of 1966, 28 U.S.C.A. § 2244 (Supp. 1967), makes it clear that only in very restricted circumstances need a second petition be entertained.

No one benefits and everyone loses by a construction of the custody requirement that prevents present attacks by prisoners in state custody upon present judgments which support future sentences. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK

FORCE: THE COURTS 45 (1967). The prisoner who may never be able to vindicate his constitutional claim loses most of all.

The *McNally* determination that the asserted right to complete and immediate release from behind iron bars was a precondition for the Great Writ has been termed "one of the most frustrating elements of present post-conviction practice." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES 43 (Tent. draft 1967).

> Where consecutive sentences have been imposed, the immediate release condition can unreasonably postpone for years judicial consideration of the validity of a challenged conviction or sentence while the unchallenged sentences are being served. One of the most prevalent complaints about post-conviction review is the difficulty, once a conviction has been set aside of mounting a new prosecution many years after the crime. Should a retrial be necessary, it is to the great advantage of the prosecution and the defense to marshal their respective cases while the evidence is fresh and the witnesses are available.

Ibid. In the words of one commentator: "Its principal effect is to render the search for truth even more difficult because of lost evidence and faded memories." Note, *Habeas Corpus, Custody and Declaratory Judgment*, 53 Va. L. Rev. 673, 682 (1967).

The cases of Rowe and Thacker are typical of the case where "constitutional claims turn upon the resolution of contested factual issues." *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963). The guarantee made clear there that a habeas

applicant will have at least one "full and fair fact hearing," *id.* at 313, is rendered illusory for them by the *McNally* rule.

B. Refusal to Hear a Claim That a Criminal Judgment Is Unconstitutional Until It Actively Prevents the Prisoner's Immediate Release Forces the Prisoner to Serve Time Under the Conviction Which He May Now Be Able to Show Was Imposed in Violation of His Constitutional Rights.

The inherent delays of the judicial process make it certain that even a successful collateral attack on a sentence of imprisonment will not come in time to save partial or even complete service of the sentence. See *Parker* v. *Ellis*, 362 U.S. 574, 577, 581-86 (1960) (dissenting opinion);[3] *Tucker* v. *Peyton*, 357 F.2d 115 (4th Cir. 1966). No one doubts that:

> Where an applicant with a meritorious claim is held in prison, the time that elapses during the post-conviction proceeding is a further serious deprivation of liberty, aggravating the hardship of imprisonment served prior to the application being filed.

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies 64 (Tent. draft 1967). See also *Mathis* v. *United States*, 369 F.2d 43 (4th Cir. 1966). In ordinary circumstances these delays must simply be accepted as nec-

[3] Parker's petitions for habeas corpus were denied in the Texas courts on September 21, 1955; by the Supreme Court on certiorari on February 27, 1956; by the federal District Court on June 24, 1957; and by the Court of Appeals on August 29, 1958. Certiorari was granted on March 2, 1959, but Parker was released from prison on June 6, 1959, before this Court acted.

essary burdens in a system which, in seeking to assure that no man is unconstitutionally deprived of his freedom, provides for deference to state courts, 28 U.S.C.A. § 2254 (Supp. 1967), for independent federal fact finding in some circumstances, *Townsend* v. *Sain*, 372 U.S. 293 (1963), 28 U.S.C.A. § 2244 (Supp. 1967), and also for appellate review, 28 U.S.C. § 2253.

Rowe and Thacker, however, can be relieved of this burden. If their sentences scheduled for future service can be attacked now and are found invalid, they will have established their right to walk out of prison as free men when they have completed service of all sentences that serve as a constitutional basis for their incarceration by the state. The heaviest burden of the attacked sentence—time spent behind iron bars—can be lifted from them now. Otherwise even if they prevail in their attacks and establish the invalidity of the sentences, time will have been served under them.

It is difficult to explain why a rule of timing of collateral attack should be enforced in such a manner as to guarantee that an attack must be made when the prisoner should be free rather than during the twenty-six year period of continuous custody which will precede that time.

C. Outstanding Future Sentences Impose Restrictions Within the Prison System of the Sort for Which Habeas Corpus Has Been the Traditional Remedy. Length of Sentence and Number of Convictions Play a Significant Role in Determining the Amount of Freedom Any Individual Will Have in Prison and His Eligibility for the Various Rehabilitative Programs That Lie at the Heart of the Modern Penal System.

Well before sentences are scheduled for service, and even before they impinge upon a prisoner's eligibility or chances for parole, they have had a substantial effect upon the degree of custody to which a prisoner is subjected.

The very first decision made after an inmate is incarcerated to serve a sentence normally relates to the degree of custody which he will require within that institution.

> Institutions for adults ordinarily have three or four grades of custody: minimum, medium, maximum, with some using a close-custody category between medium and maximum. The custody classification ordinarily determines the type of supervision and the type of restrictions under which an inmate must live. For example, in an institution having cells and dormitories, inmates classified for minimum or medium custody may be permitted to live in dormitories, with more freedom of movement. Also the custody rating may determine whether the inmate may be used in certain types of employment.

Loveland, *Classification in the Prison System,* in The Sociology of Punishment and Correction 189, 191 (1962).

Within these complex gradations of custody and privilege and various programs of rehabilitation and education in

modern penal systems, a prisoner's status is inevitably determined in large part by his criminal record: the length and number of his sentences and the nature of the crimes of which he has been convicted. *Ibid.; cf.* Loving, Stockwell, and Dobbins, *Characteristics of Escapees, id.* 144, 145.[4] Typically, the new arrival at a prison is quarantined for a certain period, during which time his case is studied by a committee and he is "classified" for placement within the system's gradations of custody and training. This procedure is followed in Virginia. See DIVISION OF CORRECTIONS, VIRGINIA DEPARTMENT OF WELFARE AND INSTITUTIONS, CLASSIFICATION IN THE VIRGINIA PENAL SYSTEM 9-10 (1950) (hereinafter cited as CLASSIFICATION IN VIRGINIA). Virginia has a number of different penal institutions, see Va. Code Ann. §§ 53-20 to 53-128 (1967), which are apparently designed, as in the typical penal system, to provide differing degrees of custody and different vocational and educational programs, see CLASSIFICATION IN VIRGINIA 3, 7-8. Moreover, within the system as a whole there are the typical gradations of custody, ranging from "meditation" and "segregation" within the notorious maximum security unit of the Virginia penitentiary, "C" building, see *Landman* v. *Peyton,* 370 F.2d 135 (4th Cir. 1966), *cert. denied,* 388 U.S. 920 (1967); *Howard* v. *Smyth,* 365 F.2d 428 (4th Cir.) *cert. denied,* 385 U.S. 988 (1966), through inclusion in the normal prison population, to "minimum custody," where the "inmate is sufficiently trustworthy to be allowed to live in honor camps or their equivalent and to hold trusty jobs outside the limits of the main institution." CLASSIFICATION

[4] The individual may not only be transferred within the institution to different grades of custody; he may also be moved to an entirely different institution of greater or lesser custody. Loveland, *supra* at 192.

IN VIRGINIA 7. The inmate's initial assignment to institution, type of custody and vocational program is made by the classification committee. *Id.* at 6-8. Typically such "preselection" is made "on the basis of geography, age, *length of sentence,* nature of offense, *prior criminal record* and other factors." RICHMOND, PRISON PROFILES 14 (1965) (emphasis added). Thus unconstitutional convictions to be served in the future clearly impinge upon a prisoner from the moment he enters a penal institution; such sentences play the same role as a valid sentence in determining how a prisoner will be treated within the system, the amount of freedom he will have, and his very placement within the prison's rehabilitative vocational program, which exerts a potent influence on his entire future.

The effect of multiple sentences upon treatment of a prisoner is magnified in most penal institutions by the variation between theory and practice. The objective of true individualized treatment is impaired both by the inevitable administrative difficulties created by the prison context, and the lack of articulated criteria for the classification and treatment of individuals. Virginia agrees with most other jurisdictions that "classification is a method of individualized study of prisoners which utilizes information secured, as a basis for recommending a treatment program for the prisoner aimed at his retraining and re-education while in prison." CLASSIFICATION IN VIRGINIA 1. Compare AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 262 (1954). The state's manual on classification procedures does not contain any guidance on the factors to be taken into account in formulating a treatment program or how the committee is to go about evaluating the individual prisoner. It has been pointed out that "be-

cause operational guides are lacking, these objectives [of the classification program] are easier to realize in manuals than in reality." KORN & MCCORKLE, CRIMINOLOGY AND PENOLOGY 479 (1959). As administrative procedures rigidify, the role which such factors as length of sentence and number of convictions play in the treatment of a prisoner is inevitably magnified.

Virginia seeks to avoid this administrative rigidity through a system of periodic "reclassification." CLASSIFICATION IN VIRGINIA 4-5. The efficacy of this system of review is impaired, however, by the fact that reclassification does not take place at regular intervals, is discretionary with the classification committee, and apparently takes place only when some member of the committee feels that "a major change in the prisoner's recommended program is indicated." *Id.* at 5. Indeed, studies have indicated that where, as in Virginia, treatment and classification are separate functions performed by separate groups of officials, and classification is carried on by a group of disparate specialists who have little contact with the prisoner during his stay outside of an initial personal interview and occasional later contact, there is an inherent risk that communications will "snarl" and procedures will become inflexible. JOHNSON, CRIME, CORRECTION, AND SOCIETY 606-07 (1964). Where this happens it is inevitable that the sheer statistics in a prisoner's record, principally his total term, will weigh heavily in the determination of the nature of his continued custody and treatment within the prison. When some of the convictions which represent the ciphers in this custody-treatment equation have been imposed in violation of the federal constitution, they are real and severe and immediate restraints upon the prisoner's liberty

far worse than those which the Great Writ has already been used to attack. See *Jones* v. *Cunningham,* 371 U.S. 236 (1963). The fact that they are to be served in the future in no way lessens the impact of such convictions on the relative freedom which a prisoner has within the penal system, nor ameliorates the manner in which they influence the choice of his work program and thus the way in which the individual prisoner is to be related to the grand rehabilitative ideal. They are not considered present sentences or future sentences. They are just plain sentences which have an impact on the prisoner.

Rehabilitation is the great ideal of modern penology. Success or failure of a penal program is judged in terms of the percentage of recidivism. See *e.g.,* GLASSER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM ch. 4 (1964). The Virginia Department of Corrections, in the introduction to CLASSIFICATION IN VIRGINIA, states that the objective of the prison system is "to provide for the protection of society which involves efforts to correct and restore prisoners to society better able to live self-sustaining and useful lives upon their release."

To this end a variety of vocational and educational programs are universally provided in American prisons today. Our common sense tells us that, just as the number of convictions a man has will inevitably exert an influence upon the parole board considering his case for release, prison officials are going to expend more time and effort in the rehabilitation of men with prospects for imminent return to society than with long-termers, both because the latter will probably not be released for many years and because the very length of their records will be taken as evidence that they are beyond rehabilitation.

Rehabilitative potential tends to vary inversely with length of total sentence. See Farber, *Suffering and Time Perspective of the Prisoner,* 20 University of Iowa Studies in Child Welfare 155 (1944). Long consecutive sentences produce desperation in prisoners. TAPPAN, CRIME, JUSTICE AND CORRECTION 470 (1960); JOHNSON, CRIME, CORRECTION, AND SOCIETY 523-24 (1964).[5] Prison administrators are aware of this. To the extent convictions imposed in violation of the Constitution play a part in such considerations, they presently affect the prisoner in the context of our modern penal system.

II.

A State Prisoner Committed Under Consecutive Sentences Is Entitled to a Federal Habeas Corpus Hearing if Any of His Sentences Is Based Upon a Prima Facie Unconstitutional Conviction.

McNally, a federal prisoner, alleged that an unconstitutional sentence was being taken into account in computing his eligibility for consideration by the parole board for

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[5] Aside from these tangible effects, can it not be said that the senseless imposition of procedures which subject a prisoner to continuous uncertainty with respect to his rightful release date, and continuous frustration at his inability to secure relief from convictions unjustly imposed, constitutes cruel and unusual punishment? The relationship of the eighth amendment to the rehabilitative ideal is unclear. See Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court,* 16 Stan. L. Rev. 996, 1012-13 (1964); *cf. Robinson* v. *California,* 370 U.S. 660 (1962). However, there is a very real sense in which the erection of procedural barriers which serve no valid purpose and which impose such frustrations upon the prisoner that his rehabilitative progress is as a practical matter severely impeded is senselessly cruel. And why is not the needless fostering of anguish, frustration, uncertainty and bitterness, when the remedy involves nothing more difficult than early adjudication of claims, cruel in and of itself?

conditional release from the penitentiary. He further alleged that if only his constitutional sentences were considered he would be eligible to apply for parole. *McNally* v. *Hill*, 293 U.S. 131 (1934). This Court held that the writ would only issue under the statute "for the purpose of inquiring into the cause of restraint of liberty," *id.* at 135, and that the "sentence which the prisoner has not yet begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." *Id.* at 138.

Almost thirty years later this Court again considered what those restraints on liberty were which would cause the writ to issue and unanimously held it to be the function of federal courts to give meaningful content to the statutory phrase "in custody" in 28 U.S.C. § 2241:

> The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those "in custody," the statute does not attempt to mark the boundaries of "custody" . . . .

Jones v. *Cunningham*, 371 U.S. 236, 238 (1963) (footnote omitted). Whether a particular restraint constitutes "custody" is, this Court said, to be determined by looking to "common-law usages and the history of habeas corpus both in England and in this country." *Ibid.* The Fourth Circuit has done just this.

Confronting the precise *McNally* situation on an application from a prisoner of the Commonwealth of Virginia, the Fourth Circuit reasoned that after *Jones* v. *Cunningham* and *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court, "faced with the issue today . . . might well reconsider *McNally* and hold that a denial of eligibility for parole is a 'restraint

of liberty' no less substantial than the technical restraint of parole." *Martin* v. *Virginia*, 349 F.2d 781, 784 (4th Cir. 1965). The court then held that a bar to eligibility for consideration for parole and conditional release was a restraint of liberty within the reach of habeas corpus.

Two years later, upon the petition of a prisoner whose eligibility for parole was no longer barred by his allegedly illegal sentence since in the process of exhausting his state remedies he had become eligible, the Fourth Circuit held that the very existence of the allegedly illegal sentences was so likely to prejudice his chances for conditional release on parole that habeas corpus must be made available. *Williams* v. *Peyton*, 372 F.2d 216 (4th Cir. 1967).

These holdings—deliberate and reasoned departures from *McNally*—advance the inevitable day on which the Commonwealth will have to account for the alleged deprivations of constitutional rights in Rowe's and Thacker's convictions. In early 1971, when the allegedly invalid sentence for abduction begins to affect Rowe's parole eligibility, he will be able to attack the conviction under *Martin* v. *Virginia*, 349 F.2d 781 (4th Cir. 1965). Thacker is seeking to attack sentences which can never affect his statutory eligibility for parole, since the total period of his incarceration is to be so lengthy. He will, however, become automatically eligible for parole in 1976 at the expiration of 12 years from the date of his present confinement. VA. CODE ANN. § 53-251 (1967). When he becomes eligible for parole, he will be in a position to test the legality of his housebreaking sentences under the Fourth Circuit departure from *McNally*. *Williams* v. *Peyton*, 372 F.2d 216 (4th Cir. 1967).

Williams and *Martin* read strictly would still result in the wasteful postponement of factual hearings upon peti-

tions which should be heard as soon as possible, and would take no account either of real detriments imposed by presently outstanding sentences to be served in the future, or of the power of the court to make the Great Writ presently available. The Fourth Circuit recognized this and concluded that taking the further step in the present case was "both logical and necessary" (A. 18), *Rowe* v. *Peyton*, 383 F.2d 709, 715 (4th Cir. 1967).

The "grand purpose" of the Great Writ of habeas corpus is "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). That purpose cannot be achieved where the availability of the writ is hedged about with restrictions which are both technical and unnecessary and which may ultimately destroy the one chance an unconstitutionally convicted prisoner has to demonstrate that the state denied him due process of law. Habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). The writ lies to lift restraints upon an individual's liberty "to do those things which in this country free men are entitled to do." *Ibid.*

Jones represented no abrupt break with the past. While in a comparatively recent attempt to limit the functional content of the "custody" language in the federal habeas corpus statutes, this Court had refused to issue the writ unless it could result in the prisoner's immediate and total release from iron-bar confinement, *Holiday* v. *Johnston*, 313 U.S. 342 (1941); *McNally* v. *Hill*, 293 U.S. 131 (1934),*

* In each case where this Court held premature the application for a writ of habeas corpus to attack a sentence scheduled for future service it carefully pointed out the existence of another

Jones recognized the subtle gradations of "custody" and "restraints upon liberty" which have come into being since the dark days of the Star Chamber. Jones, a convict out on parole, was permitted to attack the constitutionality of the conviction which empowered the parole board to control his right to travel, to drive a car and to do numerous other things "which in this country free men are entitled to do." *Jones* v. *Cunningham, supra,* 243. In making the writ available to Jones, this Court aligned itself with the liberal historical tradition of the writ, which has been invoked in a variety of situations far removed from the context of release from prison confinement.

Pointing to this historical virtuosity, this Court declared that "the Great Writ . . . always could and still can reach behind prison walls and iron bars. But it can do more." *Ibid.* Mr. Justice Black catalogued some of the legal impairments which the writ has been invoked to remove. Habeas corpus has been available to husbands seeking to free their wives from constraint of guardians, *Rex* v. *Clarkson,* 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1722), and to require a master to surrender an indentured 18-year-old girl, *Rex* v. *Delaval,* 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763). And despite the statutory "custody" language, "in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." 371 U.S. at 239. Thus this Court has

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method of securing relief in the federal courts. *McNally* v. *Hill,* 293 U.S. 131 (1934) (mandamus of the parole board); *Holiday* v. *Johnston,* 313 U.S. 342 (1941) (application for vacation of sentence and resentence in conformity); *Heflin* v. *United States,* 358 U.S. 415 (1959) (Federal Rule of Criminal Procedure 35). In *Darr* v. *Burford,* 339 U.S. 200, 203 (1950) the question of a remedy was not urged and alternative grounds for denial of the writ were present.

repeatedly granted habeas corpus to determine the validity of an alien's exclusion from the United States, even though the petitioner was free to travel anywhere else in the world. *E.g., Brownell* v. *Tom We Shung,* 352 U.S. 180 (1956); *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953). Habeas has also been long considered the appropriate vehicle for challenging induction into the armed forces, *e.g., United States ex rel. Steinberg* v. *Graham,* 57 F. Supp. 938 (E.D. Ark. 1944), and for settling disputes between parents over the custody of children, *e.g., Boardman* v. *Boardman,* 135 Conn. 124, 62 A.2d 521 (1948). The history of this humane and flexible judicial tool demonstrates that it is available to test a wide variety of legal impairments, "restraints upon a man's liberty, restraints not shared by the public generally," 371 U.S. at 240, for which no other remedy lies.

Even in the narrow context of post-conviction relief, where the writ has blossomed into a great vehicle for safeguarding federal rights by securing federal judicial review, *e.g., Fay* v. *Noia,* 372 U.S. 391 (1963); *Brown* v. *Allen,* 344 U.S. 443 (1953), this Court never rigidly and mechanically insisted that a prisoner assert a right to immediate release from all custody in order to invoke the writ. As early as 1894, this Court permitted a federal prisoner incorrectly sentenced to a prison term and confined in a state penitentiary (no federal prison was available) to seek transfer to a federal jail, even though the writ could not effect his release from custody. *In re Bonner,* 151 U.S. 242 (1894). And in *Ex parte Hull,* 312 U.S. 546 (1941), decided just before *Holiday* v. *Johnston,* 313 U.S. 342 (1941), the Court seriously undermined the release-from-custody rule by allowing a prisoner whose parole under a prior sentence was

revoked when he received a second conviction to attack the second conviction while still serving the admittedly valid first sentence.

Some lower courts have read *Jones*, in the context of this Court's repeatedly demonstrated concern with the availability of some federal post-conviction remedy to test the constitutionality of state criminal convictions, as signalling a recognition that the rigidities of the old "custody" jurisprudence will not serve the "grand purpose" of the writ in a time characterized by a proliferation of increasingly subtle correctional processes and developing standards of due process of law. The Ninth Circuit, for example, held in reliance on *Jones* that probation constitutes sufficient "custody" for issuance of the writ. *Benson* v. *California*, 328 F.2d 159 (9th Cir. 1964).

Nor have the courts been insensitive to the anomaly inherent in expanding the availability of the writ to test restraints imposed outside the prison context while continuing to hold those actually incarcerated to the rigors of a strict and formalistic approach. Thus it has been held since *Jones* that a prisoner may attack a sentence he is presently serving, even though invalidation of the sentence will not result in his immediate release because he still must serve other consecutive future sentences. *United States ex rel. Watson* v. *Myers*, 250 F. Supp. 292 (E.D. Pa. 1966). The Fourth Circuit has permitted a state prisoner to attack a sentence he has already served, on the theory that it would advance the time at which he began serving his current valid sentence, even though he had not served enough total time to satisfy the valid sentence. *Tucker* v. *Peyton*, 357 F.2d 115 (4th Cir. 1966). The Ninth Circuit has held the writ available to attack past sentences that rendered a prisoner

ineligible for probation at his sentencing for his current, admittedly valid conviction. *Arketa* v. *Wilson*, 373 F.2d 582 (9th Cir. 1967). The Second Circuit has consistently held that if an allegedly invalid prior conviction has caused the petitioner to be sentenced under a different schedule of penalties as a second offender he can seek habeas corpus even though he has not yet served the sentence he might have received as a first offender. *United States ex rel. LaNear* v. *LaVallee*, 306 F.2d 417 (2d Cir. 1962). And in *Martin* v. *Virginia*, 349 F.2d 781 (4th Cir. 1965), reading *Jones* in light of the Court's strong emphasis in *Fay* v. *Noia*, 372 U.S. 391, 424 (1963), upon

> the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review,

the Fourth Circuit concluded on the basis of *Jones* and *Noia* that this Court would decide *McNally* differently today, and permitted an incarcerated petitioner to seek habeas corpus where the only effect was to render him eligible for parole. The court stated that in practical terms the convictions under attack were "the real, effective basis of Martin's continuing detention in a penal institution," 349 F.2d at 784, since they deprived the parole board of any discretion to release him from custody.

The conclusion of these lower courts is thoroughly consistent with the history of the Great Writ as articulated in *Jones* v. *Cunningham*. *McNally*, insofar as it is premised on a holding that only simple iron-bar confinement which is alleged to be invalid may be reached by habeas corpus, is an aberration in the history of the Writ. The Writ

neither historically nor statutorily is limited to such situations: all intolerable restraints on liberty can be attacked by the writ—at least when no other remedy is available.

What remains then is a rule of timing which receives no sanction from the statute. Granting relief to Rowe and Thacker now rather than in 1993, 1976, or 1971 will mean that the Superintendent would be forbidden now and henceforth to attach any significance to the attacked sentences. He must adjust his records by deleting from the totality of their custodial tenure the sentences invalid under the Constitution and laws of the United States.

A. The Great Writ Is Not Limited by Statute to Those Prisoners Who Assert an Immediate Right to Complete Release From All Forms of Custody Whatsoever.

The *McNally* decision is understandable only in light of the inarticulate premise—since expressly rejected by this Court in *Jones* v. *Cunningham,* 371 U.S. 236 (1963)—that the only restraint upon liberty federal habeas corpus may relieve in post-conviction cases is physical imprisonment behind iron bars. Any restraint short of this, such as present ineligibility to be considered for parole, was held not to qualify as a "restraint which the statute makes the subject of inquiry." 293 U.S. at 138. Given this premise, there was only one form of restraint, iron-bar custody, cognizable in a habeas proceeding, and a petition which failed to allege facts showing unlawful iron-bar custody was without merit. No hearing was required because on the facts alleged the habeas corpus remedy was unavailable.

After the *Jones* decision, it was once again clear that restraints upon personal liberty not amounting to iron-bar

custody may nonetheless constitute the custody that "is a prerequisite to habeas." *Fay* v. *Noia*, 372 U.S. 391, 427 n. 38 (1963). While it remained true that "the only remedy that can be granted on habeas is some form of discharge from custody," *ibid.*, a new question arose when the subtler forms of custody—custody without iron bars—were recognized in *Jones* as within the scope of the Great Writ. For the first time since *McNally*, there existed the possibility of two simultaneous "custodies," one within the other, one unlawful and the other lawful. Thus a prisoner lawfully held in the "custody" of iron bars might nonetheless allege his personal liberty constituting an unlawful "custody" significant, intolerable, unconstitutional restraints upon from which habeas corpus is available to discharge him. This possibility had been present before *McNally* introduced the aberrational limitation of habeas to cases of unlawful physical confinement, and it arose with greatly expanded significance almost thirty years later, when the erroneous premise of *McNally* was expressly considered and rejected by this Court in *Jones*.

Thus the Fourth Circuit in *Martin* v. *Virginia*, 349 F.2d 781 (4th Cir. 1965), though faced with the precise facts of *McNally*, was confronted with a significantly different legal problem because of the renewed recognition in *Jones* that the Great Writ lies to remedy unlawful restraints of liberty less complete than the totality of custody behind iron bars. The Fourth Circuit properly held, on the basis of *Jones*, that the obvious, clear-cut restraint of personal liberty inhering in ineligibility to be considered for parole was a custody from which discharge could be afforded by the federal writ of habeas corpus even though Martin might remain in iron-bar custody. If Martin's future sentence was imposed without due process, he could be totally and

immediately released from the intolerable restraint of parole ineligibility—the certain custody of iron bars—and remanded to the less onerous custody of imprisonment with eligibility for parole, and possibly the even less severe custody of parole itself, outside the walls of the Virginia State Penitentiary.

The Great Writ "reaches behind prison walls and iron bars. But it can do more." *Jones* v. *Cunningham,* 371 U.S. 236, 243 (1963). In *Jones* the writ did more in that it operated outside iron bars. It can also "do more," can discharge prisoners from intolerable, unconstitutional restraints of personal liberty, within prison. Habeas corpus is a prisoner's writ. It is his access to court, and his remedy for release from unlawful restraints within prison as well as from unlawful imprisonment itself.

The *McNally* premise limiting habeas relief to those cases where complete immediate discharge from iron-bar custody could be granted was an aberration in the history of habeas corpus. There is certainly nothing in the language of federal habeas corpus legislation, nor has there ever been, that compels the *McNally* premise.[7] As this Court observed in *Jones,* the statute does not purport to tell us what "custody" means. 371 U.S. at 238. Further the historical development of the federal legislation suggests that the word "custody," as well as the similar expressions "detention" and "restraint of liberty," have been used at different times with such variant purposes that to attach a restrictive technical meaning to the word "custody," as was done in *McNally,* is a hazardous business, and especially

[7] The relevant statutory provisions, from the Judiciary Act of 1789 to date, are included in an Appendix to this brief.

so in light of the fundamental and libertarian "grand purpose" of the Great Writ.

In section 14 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 81, 82, the first federal habeas corpus statute, the "cause of commitment" was made the subject of inquiry on habeas corpus. The word "custody" was used only to limit jurisdiction in cases involving "prisoners in gaol" to prisoners in federal, as distinguished from state, custody. Federal habeas corpus was not generally extended to state prisoners until the Act of February 5, 1867, c. 28, 14 Stat. 385, 386, which gave federal courts "power to grant writs of habeas corpus in all cases where any person may be restrained of his liberty in violation of the constitution, or of any treaty or law of the United States." The only reference to "custody" is a provision that the person applying for the writ should set forth "in whose custody he or she is detained."

The 1867 act was intended to extend federal habeas corpus jurisdiction to prisoners in state custody who claimed a federal right to be free from a restraint upon personal liberty. Its intended scope was recognized by this Court in *Fay* v. *Noia*, 372 U.S. 391, 417 (1963): it was " 'to enlarge the privilege of the writ . . . and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty.' " (Quoting remarks of Representative Lawrence of Ohio, who sponsored the bill, Cong. Globe, 39th Cong., 1st Sess. 4151.) The act " 'brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction.' " (Quoting *Ex Parte McCardle*, 6 Wall. 318, 325-326 (1868).)

Had the issue decided in *McNally* in 1934 arisen earlier under the language of the Judiciary Act of 1789, it would appropriately have turned upon construction of the phrase "cause of commitment" rather than the word "custody." If the same issue had arisen originally in a state prisoner's case under the 1867 Act, it would have turned upon construction of the phrase "restrained of his liberty." In the codification of federal habeas corpus legislation in Title 13 of the Revised Statutes of 1874, §§ 751-766, the jurisdictional grants of earlier legislation were collected in one provision, section 753. Here, in the clause governing habeas corpus to state prisoners, the word "custody" was substituted for the phrase "restrained of his liberty," and the identity of the two concepts arose. "Custody in the sense of restraint of liberty is a prerequisite to habeas," as this Court observed in *Fay* v. *Noia*, 372 U.S. 391, 427 n. 38 (1963).

In the form they acquired in 1874 and still retain, the federal habeas corpus provisions suggest affirmatively that relief need not be limited to the discharge from all custody or to cases in which imprisonment itself is totally unlawful, as *McNally* held. Today, the relief authorized is disposition "of the matter as law and justice require." 28 U.S.C. § 2243 (1964). At the time of *McNally*, the provision called for disposition "of the party as law and justice require." 28 U.S.C. §761 (1925). The 1867 act extending habeas corpus to state prisoners provided that "if it shall appear that the petitioner is deprived of his or her liberty, in contravention of the constitution or laws of the United States, he or she shall forthwith be set at liberty." Act of Feb. 5, 1867, c. 28, 14 Stat. 384-85. Section 14 of the Judiciary Act of Sept. 24, 1789, c. 20, 1 Stat. 81, 82, conferred authority to issue the writ "agreeable to the principles of

law," and "for the purpose of an inquiry into the cause of commitment."

If the statutes had meant to limit habeas corpus relief to complete discharge from all custody, language unequivocally to this effect might have been chosen. But it never was. The varying uses of the word custody, and the increasingly flexible statutory provisions describing the relief available upon the writ, suggest that Congress never considered the *McNally* problem.

In *McNally* this Court found in the statute governing federal prisoners a requirement limiting habeas corpus to those asserting a right to release from all custody. In quoting the statutory custody requirement for federal prisoners, the Court's opinion quoted with it the deceptively symmetrical language referring to custody of state prisoners "in violation of the Constitution or of a law or treaty of the United States" that had been introduced in the Revised Statutes of 1874. 293 U.S. at 135-36. This may well have contributed to the conclusion the Court reached; the custody language in the two clauses has two very different histories. In addition to the statutory language, the Court relied upon the English common law, the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, English decisions interpreting that Act, and prior decisions of this Court, as giving meaning to the statutory language. 293 U.S. at 136-39.

It is true, of course, that in the great majority of English as well as American cases the unlawful restraint from which relief was sought did amount to the total custody of physical imprisonment. Beyond this, however, the English precedents relied upon in *McNally* contain no affirmative support for the *McNally* result, and do not speak to the

McNally problem one way or the other. This is largely because the writ's use under the Act of 1679 was directed primarily to the validity of pretrial commitment and the prisoner's entitlement to bail, 293 U.S. at 137, n. 1, rather than to post-conviction relief. In such cases, the criminal trial court either has jurisdiction to try the offense or it does not, and the offense is either subject or not subject to bail; if there is any wrongful restraint upon liberty, it is imprisonment itself. Early English common law's failure to speak to the *McNally* problem is also due in part to a pre-Revolutionary social framework in which today's subtle forms of restraint upon liberty were unfamiliar. The web of restrictions imposed upon Jones' liberty by his parole order, in *Jones* v. *Cunningham,* 371 U.S. 236 (1963), and the far-reaching impact of his unreversed Texas conviction upon Parker's rights and future as a free man in *Parker* v. *Ellis,* 362 U.S. 574 (1960), are relatively recent social phenomena, and it should not be surprising that an eighteenth-century Englishman would be unlikely to anticipate them, and more concerned with the simpler problem of challenging the jailer's right to hold him behind iron bars.

In any event, the Great Writ was not restricted to applicants demanding total release from physical confinement even in eighteenth-century England, as this Court observed in *Jones* v. *Cunningham, supra* at 238-39 (1963). In *Rex* v. *Delaval,* 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763), for example, the writ was used to require production in court of Anne Catley, a minor apprenticed by her father to William Bates, because Bates had assigned her indenture to Delaval for immoral purposes. Apparently suspecting that Blake and the girl's parents were parties to the conspiracy against her, the court observed that its duty was "'to judge upon the circumstances of the particular case;

and to give their directions accordingly'," and ordered that Anne Catley "be discharged from all restraint, and be at liberty to go where she will." *Id.* at 1437, 97 Eng. Rep. at 914. Lord Mansfield indicated that under other circumstances the girl might have been returned to her father's custody. If Blake had not participated in the conspiracy, she might properly have been restored to lawful custody under the original apprenticeship indenture. Thus when faced with a complicated web of custodial claims, the King's Bench was not incapable of distinguishing between legal detention in custody and unlawfully imposed restraints of different scope.

The value of pre-Constitutional English precedents in determining the availability of the federal writ of habeas corpus in a twentieth-century context depends largely upon the mode in which the English precedents are used by this Court. In *McNally,* they were read for the least that they might mean rather than with an eye to the central function that it has been the writ's historic mission to fulfill. Significant unlawful restraint of personal liberty is certainly the historic evil that the Great Writ has been destined to eliminate, see *Jones* v. *Cunningham,* 371 U.S. 236, 238-40 (1963); *Fay* v. *Noia,* 372 U.S. 391, 401-02 (1963). This central truth is amply supported by the English precedents. But to predicate a technical restriction of the writ upon the absence of English precedent affirmatively establishing an identical use of the writ in a time when there would have been no occasion for it is to misuse history. Habeas corpus

> is not now and never has been a static, narrow formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Jones v. *Cunningham, supra* at 243. If the writ cannot now reach Rowe and Thacker it is because *McNally* read a static, narrow, formalistic conception of the Great Writ into the English precedents.

Nor was *McNally* supported by prior decisions of this Court. One line of cases upon which the Court relied in *McNally* included those holding "that *habeas corpus* may not be used as a writ of error to correct an erroneous judgment of conviction of crime, but may be resorted to only where the judgment is void because the court was without jurisdiction to render it." 293 U.S. at 138. Whatever collateral support such cases may have afforded *McNally* in 1934 is no longer available in light of subsequent decisions of this Court. *E.g., Fay* v. *Noia,* 372 U.S. 391 (1963).

The *McNally* opinion did not claim direct affirmative support in prior decisions of this Court, but did cite eight cases (while distinguishing two) in support of the statement that "wherever the issue has been presented, this Court has consistently refused to review, upon *habeas corpus,* questions which do not concern the lawfulness of the detention." 293 U.S. at 139. None of these eight cases may fairly be regarded as supporting the *McNally* doctrine. One of them, *United States* v. *Pridgeon,* 153 U.S. 48 (1894), provides a good example.

Pridgeon had been sentenced by a territorial court to five years' imprisonment at hard labor. Upon hearing Pridgeon's application for habeas corpus, a federal circuit court held he was entitled to release because the imposition of hard labor was beyond the power of the sentencing court and rendered the entire sentence void. The correctness of this holding came before this Court upon a certified question from the Sixth Circuit. The Court concluded:

(1) even if the imposition of hard labor were void rather than merely error, the sentence to five years' imprisonment was valid and Pridgeon should not be released from all custody on habeas corpus; and

(2) it was not necessary now to determine whether the imposition of hard labor was void or merely error, or "what would have been the proper action of the Circuit Court in dealing with the petitioner's application." 153 U.S. at 64.

The question thus left open in *Pridgeon* was, of course, the crucial one. And in dicta the Court suggested an answer squarely in conflict with *McNally*. Observing that release from custody would be more relief than "law and justice require" under section 761 of the Revised Statutes of 1874, since the most *Pridgeon* could have secured upon a writ of error would have been relief from the imposition of hard labor, 153 U.S. at 63, the Court's opinion suggested that proper disposition of the case would depend upon categorization of the defect in the sentence as voidness or error. If it were the latter, the Circuit Court should have denied the writ; if, on the other hand, the imposition of hard labor were void, a proper disposition would have been to recommit *Pridgeon* to the warden

> with directions to carry out and enforce only that portion of the sentence imposing imprisonment for five years, according to the rules, regulations, and discipline of the institution.

153 U.S. at 64.[8]

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[8] The suggested disposition in *Pridgeon* is strikingly similar to that suggested by the Fourth Circuit in the instant case: "[T]he court may order the Warden to strike it from the administrative records and, henceforth, to hold the prisoners for service of the valid convictions only." (A. 26-27), 383 F.2d 709, 719 (4th Cir. 1967).

Relief of the kind suggested in *United States* v. *Pridgeon* is, of course, precisely what the Court in *McNally* said was beyond the scope of habeas corpus. Yet *McNally* purported to rely upon *Pridgeon*. Thus the *McNally* thesis that a claim to immediate release from all custody must be asserted in order for federal habeas corpus to be available was not supported by pre-Constitutional English precedent nor the jurisprudence of this Court, and was not compelled by the language or history of federal habeas corpus legislation. In fact, the central purpose of the Great Writ, and its historic function as a remedy always available to challenge intolerable restraints of liberty, required and now require the opposite result.

Indeed, the arbitrary nature of a refusal to permit a man in jail to attack any part of his sentence at any time is pointed up by the variant ways in which the chronology of multiple sentences is computed. In some jurisdictions, sentences are considered to be served in the order in which they were imposed. See, *e.g.*, *Ex parte Hull*, 312 U.S. 546 (1941). In Virginia, on the other hand, sentences are served in reverse order, where a parole or suspension on an earlier sentence is revoked and a new sentence imposed at approximately the same time. *Peyton* v. *Williams*, 206 Va. 595, 145 S.E.2d 147 (1965).[9] The order in which a state chooses to list the sentences which a prisoner has to serve is not the sort of substantial consideration which should be allowed to affect the quality of adjudication available in a federal court upon a claim of deprivation of constitutional right. Whether a state chooses to list a man's sentence chronologically or in reverse chronological order, a prisoner with a

[9] Even within the prescribed framework, clerical or judicial errors in scheduling and computation can produce weird results. See *Perkins* v. *Peyton*, 369 F.2d 590 (4th Cir. 1966).

number of sentences to serve has precisely the same interest in being allowed to attack his sentence at the earliest possible moment. For a certain number of convictions, the prisoner is required to serve a certain number of years in the penitentiary. The time at which, in abstract administrative theory, he begins to serve the sentences which he wishes to attack does not change in any way either the posture of the litigation, or the interest of the parties in early and final adjudication of the constitutional issues.

In this very case it is impossible to ascertain any rational reason why Rowe should be allowed in 1983[10] to attack a 30-yeaf sentence imposed in June, 1963, and yet be prevented from attacking a sentence imposed six days later until ten more years pass—or for that matter why Thacker, now said to be serving a sentence imposed in 1964, must wait until 1994 to attack three sentences imposed in 1953.

And so the Fourth Circuit concluded:

> In a technical sense, each of the prisoners here is presently serving only one of the sentences imposed to run consecutively, but in a substantive and practical sense Rowe is serving a total commitment of 50 years and Thacker one of more than 64. For purposes of determining parole eligibility, Virginia treats the aggregate time imposed by consecutive sentences as "the term of imprisonment."[11] To the prisoner, members of his family, and fellow prisoners it matters little how the order of sentence service is listed by the clerk in the superintendent's office. The one significant, sub-

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[10] If Rowe alleged his first sentence (30 years) was invalid rather than his second (20 years), he could attack the first sentence when he served all of the time for which the state was entitled to hold him.

[11] VA. CODE ANN. § 53-251 (1967).

stantive thing is the aggregate length of his successive sentences to be served, for they govern entirely his hope for ultimate release whether by parole or by complete sentence service.

The administrative computation of the sequence of sentence service is a flimsy basis to determine the right of access to the courts for a determination of substantial constitutional claims. . . . When the one important, substantive fact is the aggregate of all of the successive sentences a prisoner is required to serve, his right of access to the courts should not be conditioned upon the sequence in which the state chooses to list consecutive or successive sentences for service.

It is only in a highly technical sense, therefore, that each of these prisoners may be said not to be serving the sentence he seeks to attack. In a substantive sense, each is serving each of the sentences for the service of which he was committed, regardless of the sequence in which Virginia has listed them for service.

Rowe v. *Peyton*, (A. 23-24), 383 F.2d 709, 717-18 (4th Cir. 1967).

B. A Federal Court Has Judicial Power to Award Present Relief in a Habeas Corpus Proceeding From Future Unconstitutional Imprisonment Under an Existing Sentence.

From the moment it is imposed, an invalid sentence clearly restrains a prisoner's liberty in significant and intolerable ways, even though it is administratively scheduled for future rather than present service. Classification and treatment within prison, and eligibility and chances for parole, are factors to which no court should close its eyes.

McNally was aberrational in holding that only the totality of physical imprisonment might be challenged in a federal habeas proceeding.

But another proposition, nowhere articulated in the *McNally* opinion, is essential to support the denial of all relief in *McNally*'s case. *McNally* was not only rendered presently ineligible for parole by the sentence he sought to attack; he would ultimately have to serve it. Even disregarding present restraints, and restraints that will definitely impinge upon a prisoner's liberty before technical iron-bar service of an invalid sentence commences and assuming the writ can only reach iron-bar confinement this Court in *McNally* was surely aware that the attacked sentence would ultimately result in custody even under the narrow, technical definition of that term adopted in the *McNally* case. McNally faced the certain prospect of physical imprisonment under it unless he should die, or be pardoned or paroled, before finishing service of his other sentences. Inherent in *McNally*'s holding that "a sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry," 293 U.S. 131, 138 (1934), is the thesis that either the statute or the Constitution incapacitates a federal court from giving present judicial relief against future unconstitutional imprisonment.

The *McNally* opinion does not explain why this should be so. The federal judicial power created by Article III of the Constitution has proved flexible enough to permit the fashioning of appropriate remedies in other contexts involving threatened future violation of constitutional rights. The statutory history of federal habeas corpus does

not reveal that any legislative attention was ever specially directed to the problem of timing in the granting of habeas relief. This Court has in a consistent line of decisions approved use of the Great Writ to grant postponed, conditional release in cases where reprosecution was deemed permissible. Other federal legislation directed specifically to the problem of timing in the granting of federal judicial relief, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, authorizes present judicial determination in cases of actual controversy even where no form of coercive relief is yet available. One of the historic functions of the Great Writ is to make full and fair fact hearings available upon claims of intolerable restraint of personal liberty, whatever the obstacles. In cases where evidence to prove a claim to release from imprisonment will in all likelihood have disappeared by the time the right to immediate release has matured, all of these considerations demand departure from the *McNally* premise that habeas corpus must await maturing of the right to immediate release.

By far the severest restraints upon the liberty of Rowe and Thacker that will ever flow from their allegedly unconstitutional convictions is their future incarceration under sentences already imposed upon them by the Virginia courts. The Superintendent of the Virginia State Penitentiary has, under *Peyton* v. *Williams,* 206 Va. 595, 145 S.E. 2d 147 (1965), postponed execution of these invalid sentences until service of other sentences has been completed, some twenty-five years hence. At that time, the Superintendent asserts the right, and is required by Virginia law, VA. CODE ANN. § 53-207 (1967), to take Rowe's liberty away completely for twenty additional years, and Thacker's for an additional fifteen years, less time off for good behavior.

These future restraints of personal liberty are of the severest kind. They are far more onerous than those from which this Court held habeas relief available in *Jones* v. *Cunningham,* 371 U.S. 236 (1963). Here total liberty is menaced. Under his parole order Jones was not permitted to drive a car, and required to live in a particular community and house, and work at a particular job. Rowe's and Thacker's movements, living quarters and work will be far more seriously circumscribed. Jones was required to submit to inspection visits at home and at work by parole officers; Rowe and Thacker will enjoy no privacy at all. Incarceration is the ultimate restraint upon personal liberty.

Only in one respect might Jones' restraints be regarded as more serious than the future prison terms Rowe and Thacker seek to challenge: Jones was already suffering the restrictions of which he complained, while the incarceration Rowe and Thacker seek to attack is a future unconstitutional prolongation of present imprisonment. But even though remote in time, imprisonment under these sentences is not remote in probability. They will be served unless death, parole or pardon intervenes.

If sentences have been unconstitutionally imposed and administratively scheduled for future service, it is not beyond the power of a federal court to afford present relief from them. There is no functional reason why a court cannot effectively grant present judicial release from a future unconstitutional restraint of liberty. Judicial relief from future imprisonment under postponed unconstitutional sentences would be coercive relief, requiring the Superintendent not to execute the sentences. The full operative impact of such relief would occur conditionally, and

at a future time, if and when valid sentences had been served, and only if Virginia had not by then obtained valid convictions by reprosecuting Rowe and Thacker in proceedings affording them due process of law.

These three qualities—coerciveness, futurity, and conditionality—are not extraordinary aspects of traditional judicial relief, nor of habeas corpus relief. All judicial relief in habeas cases is essentially coercive. Even if phrased in apparently self-executing language of discharge from custody, the court's order in effect enjoins the custodian from ever again restraining the released prisoner under the invalidated conviction. If an appropriate situation should arise, there appears to be no reason why a court might not properly award purely declaratory relief as well. See *Parker* v. *Ellis*, 362 U.S. 574, 577, 583 (1960) (dissenting opinion); 28 U.S.C. §§ 2201, 2202. But the relative rarity of such situations points up the essentially coercive nature of the Great Writ.

Coercive relief generally, and in habeas corpus cases as well, is characterized by futurity of operation. Thus in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court approved the granting of an injunction against enforcement of an unconstitutional Oregon statute "more than 2 years and 5 months" prior to the effective date of the statute. See *Society of Sisters* v. *Pierce*, 296 Fed. 928, 933 (D. Oregon 1924). In the most realistic sense, any judicial release from custody can at best only approach the ideal of immediate effect. Further, when release is ordered, it is often made conditional, and postponed until specified future events. In *Rogers* v. *Richmond*, 365 U.S. 534, 549 (1960), for example, this Court ordered release on habeas in a coerced

confession case, to be postponed "in order to give the State opportunity to retry petitioner, in light of this opinion, within a reasonable time." *Accord, Davis* v. *North Carolina,* 384 U.S. 737, 753 (1966); *Cf. Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966). In *Jackson* v. *Denno,* 378 U.S. 368 (1964), this Court went one step further in postponing and conditioning relief upon habeas. There, a judgment denying release on habeas was reversed and the case was remanded to the district court, but release was ordered postponed for a reasonable time to enable the state either to afford an adequate hearing on the petitioner's coerced confession claim, and retry him if his claim was sustained, or to retry him without attempting to validate the conviction by such a hearing. Only if the state should fail to take either of these courses was the prisoner to be, after a reasonable time, released. 378 U.S. at 395-96. *Accord, Boles* v. *Stevenson,* 379 U.S. 43 (1964). For an early precursor of the practice, see *In re Medley,* 134 U.S. 160, 175 (1890) (requiring that state attorney general be given "at least 10 days notice before the release of the prisoner").[12]

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[12] An extreme instance of futurity and conditionality in judicial relief upon habeas corpus may be found in *United States* v. *Mason,* 344 F.2d 673 (2d Cir. 1965). There, the Second Circuit entertained a habeas petition by a Spanish seaman imprisoned by the United States Navy on behalf of the Immigration and Naturalization Service (INS) as a deserter from the Spanish Navy subject to extradition under a 1903 treaty between Spain and the United States. That court concluded that neither INS nor the Navy had lawful authority to execute this provision of the treaty, but observed "that Congress and perhaps the President could easily establish a domestic enforcement machinery" for executing the provision, under which a custodian could be validly authorized to detain the complaining seaman. 344 F.2d at 688 (opinion by Marshall, J.). Thereupon the court ordered that "the petition for the writ of habeas corpus be granted and relator set at liberty, unless within a reasonable time the INS institutes appropriate deportation proceedings under

In both *Rogers* and *Jackson*, the dispositions of this Court indicated that the court below was to hold the habeas case upon its docket for the purpose of determining when a reasonable time had passed and then implementing release if the constitutionally necessary steps to justify imprisonment had not been taken by the state. Nonetheless, these decisions contemplate and in fact require the court below to issue a conditional judgment, ordering release upon habeas corpus at a future time specified only as "reasonable," and then only if certain events have not occurred. In *Sheppard* v. *Maxwell, supra,* the Court explicitly directed that the writ ordering conditional release be issued. Such conditional, prospective coercive orders are frequent in habeas cases.

> Courts finding in favor of applicants are frequently reluctant to order them immediately discharged from custody, where there is no bar to the reprosecution of the charges against them. A device sometimes used is the conditional order, providing for release at the end of six months (or some similar and extensive period) unless a new conviction is obtained within that time.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES 80 (Tent. draft 1967).

Conditional future release in the *Rogers-Jackson-Sheppard* line of decisions may, of course, be distinguished from the conditional future release sought by Rowe and Thacker.

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the Immigration and Nationality Act of 1952, or some agency demonstrating to the District Court that it has competence to execute Article XXIV of the 1903 Treaty with Spain takes over the conduct of relator's case." *Ibid.*

In those cases, the petitioners were able to assert that the warden had no present lawful authority to hold them in custody of any kind. Postponement of release is justified by the practical consideration that in many cases a petitioner unconstitutionally convicted can be properly retried.

But the distinction does not withstand close scrutiny. A state prisoner convicted upon a coerced confession is not in actuality asserting a right to immediate release from all custody. He is asserting a right to be released from all custody at a future time if the state has at that time either decided administratively not to reprosecute, or reprosecuted without success. If that is the maximum relief this Court authorizes in such cases, it surely does not matter that the petitioner in such a case may assert fictitiously that he is entitled to immediate release from all custody. His actual right to release is qualified by futurity and conditionality, and is not different in kind from the rights asserted here.[12]

No one seriously could question, and in fact the Commonwealth concedes, that Rowe and Thacker cannot possibly be given adequate hearings in 1993 or 1994 on their factual

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[12] A habeas petitioner who is subject to reprosecution may also assert a present right to be discharged from the unlawful restraints of custody as a convicted felon into the less onerous custody of one accused of crime and committed for trial. Between the judgment ordering conditional future discharge from all custody and its effective date, it may be proper to alleviate penitentiary imprisonment by ordering that the petitioner's right to prepare his defense be effectuated by affording a right "to bail or detention in the county of trial." AMERICAN BAR ASSOCIATION PROJECT, *supra* at 80. In appropriate cases, such relief should be afforded upon habeas corpus, just as Rowe and Thacker are presently entitled not only to a judicial determination of their rights to future release from all custody, but also to immediate release from all present restraints of liberty flowing from their sentences scheduled for future service.

assertions concerning events that took place in 1953 and 1963. Nor is it suggested that the Superintendent of the Virginia State Penitentiary would or legally could release them at that time unless a court has ordered him to do so or judicially declared that the sentences scheduled for service then may not lawfully be carried into execution. Virginia will not provide an adequate factual hearing and determination of this question because it follows the *McNally* doctrine, as construed by its Supreme Court of Appeals, and holds that no habeas corpus hearing may be held to determine the validity of a sentence administratively scheduled by the Superintendent for future service until that service commences. *Peyton* v. *Williams,* 206 Va. 595, 145 S.E.2d 147 (1965). If this Court adheres to *McNally,* no federal hearing will be available until that time, either.

The reasoning of this Court in supporting grant of an injunction against enforcement of a statute well in advance of its effective date in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 536 (1925), was that "injury to appellees was present and very real," and "if no relief had been possible prior to the effective date of the act, the injury would have become irreparable." The same reasoning supports present judicial relief from sentences already imposed but administratively scheduled for future service. If no relief is presently given, irreparable injury will have occurred by the time relief can be given. Not only will the prisoners be compelled to serve time under the sentences in question while pressing their claims to relief through the courts; as a practical matter, their claims will have been destroyed by the passage of time. In both respects, their injury will have become irreparable.

Habeas corpus is uniquely and historically suited to afford a constitutionally reliable fact hearing on a prisoner's claim for judicial relief from unconstitutional restraint of liberty. Whatever obstacles to such a hearing custodians may have thrown up at different times, habeas corpus has overcome. When no fact hearing is required, the writ may properly be limited to its ultimate purpose of discharging a prisoner from custody. *Walker* v. *Johnston*, 312 U.S. 275, 283-86 (1941); 28 U.S.C. § 2243. But when facts material to lawfulness of detention are controverted, habeas corpus opens the way to a hearing on those facts. Obstacles to fact hearings have ranged from the primitive fact that the prime and complaining witness is in the custodial control of the defending respondent to the more sophisticated doctrinal obstacle of *res judicata*. But neither the resistance of a contumacious warden nor "conventional notions of finality in criminal litigation" have been permitted "to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay* v. *Noia*, 372 U.S. 391, 424 (1963). "Plenary federal judicial review" includes full and fair hearing and determination upon controverted fact issues. The Great Writ has historically been the remedy that affords it.

> Even if the state court adjudication turns wholly on primary, historical facts, the Federal District Court has a broad *power* on habeas to hold an evidentiary hearing and determine the facts.

Id. at 422.

The obstacle to a full and fair fact hearing in this case is not the Superintendent's power to prevent the major

witnesses from testifying. Nor is it the conclusive effect normally accorded to final state court adjudications. Rather it is the obstacle of staleness, of the disappearance of evidence and the disappearance or death of witnesses to prove the prisoners' claims, combining with the patent inability of a prisoner to take any steps to protect himself by gathering and preserving evidence. If habeas corpus assures plenary fact hearings on claims of unconstitutional restraint of liberty, habeas corpus is and must be available now, while there are witnesses and evidence available to be heard and examined. It is not beyond the capacity of the Great Writ to overcome this obstacle.

If respondents are denied any effective opportunity to prove their claims by the conjunction of the *McNally* doctrine and Virginia's concurrent denial of any post-conviction remedy, serious constitutional questions are presented. This Court granted certiorari in *Case* v. *Nebraska*, 380 U.S. 924 (1965), to determine whether a state was required to make available an adequate post-conviction corrective process for litigating federal claims. Intervening action by the Nebraska legislature rendered decision unnecessary, and the case was remanded. 381 U.S. 336 (1965). This Court thus did not have to answer either the limited question of the Fourteenth Amendment due process compulsion to make such a remedy available or the supplementary question what constitutes an adequate corrective process.

In a concurring opinion, 381 U.S. at 340-47, Mr. Justice Brennan suggested that necessary attributes of an adequate corrective process include swiftness and full fact-finding. The *McNally* interpretation of section 2241 as a limitation on the time when violations of the federal Constitution in obtaining a conviction may be raised presents under the

Fifth Amendment the question whether Congress has denied due process by so limiting the federal corrective process for claims of federal unconstitutionality.

When federal prisoners seek relief, the analogy between federal and state due process is complete. When state prisoners seek federal relief and the state corrective process is inadequate because the state follows the *McNally* rule, as in this case, the constitutional question that caused certiorari to issue in *Case* v. *Nebraska* is present. Constitutional inadequacy of the state corrective process would itself make the prisoner's confinement a federally unlawful custody, and without more entitle him to discharge. Even as to states that do not apply the *McNally* limitation, such as California, the *McNally* interpretation of section 2241 would render it constitutionally infirm as depriving federal courts of the only effective means—a swift and, if necessary, evidentiary habeas hearing—to determine whether the state's corrective process was in fact constitutionally adequate, under the principles this Court announced in *Townsend* v. *Sain,* 372 U.S. 293 (1963).

These serious constitutional questions are obviated by the interpretation of section 2241 urged here, which would not prohibit federal courts from hearing and determining claims that convictions and sentences have been unconstitutionally imposed prior to their actual iron-bar service in the *McNally* sense.

III.

Prisoners With Presently Outstanding Sentences Which Must Be Served in the Future Have a Justiciable Controversy With the State Which Allegedly Violated Their Constitutional Rights in Obtaining the Convictions. If the Sentences Are Invalid They Are Entitled to Declaratory Relief Whether Habeas Corpus Is Available or Not.

If this Court should conclude that habeas corpus is unavailable to Rowe and Thacker, the case is not ended. The habeas petitions should be treated as motions for declaratory judgment, and the courts below should be directed to entertain these motions, hold factual hearings and rule now upon the constitutional allegations.

The Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1964), provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The beneficent remedial purpose of this act is to provide a "speedy and inexpensive method of adjudicating legal disputes before damage has actually been suffered." *Lehigh Coal & Nav. Co.* v. *Central R.R.*, 33 F. Supp. 362, 365 (E.D. Pa. 1940). Only by adjudicating the questions pre-

sented by Thacker and Rowe now can this court assure that potentially unconstitutional sentences may be invalidated "before damage has actually been suffered." Nothing in the language of the statute or in the jurisprudence of declaratory judgments impedes the grant of present relief to Rowe and Thacker. See *Ragan* v. *Commandant*, 290 F.2d 132 (10th Cir. 1961). There is federal jurisdiction of their claims, the cases present justiciable controversies ripe for decision at this time, and there is no occasion for discretionary abstention from the exercise of the court's power to declare the rights of these two state prisoners. See Note, *Habeas Corpus, Custody and Declaratory Judgment*, 53 Va. L. Rev. 673, 687-701 (1967). Indeed, the very policies the act was designed to serve compel the conclusion that declaratory relief should be available here. As the Fourth Circuit recognized early in the judicial career of the Declaratory Judgment Act in a leading interpretation:

> We think this discretion [to grant declaratory relief] should be liberally exercised to effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.

Aetna Cas. & Sur. Co. v. *Quarles*, 92 F.2d 321, 324 (4th Cir. 1937).

Nor is the Declaratory Judgment Act any stranger to criminal-related proceedings or to tests of the legality of confinement. "The declaratory judgment is a general remedy not confined to any particular type of controversy." *Hurley* v. *Reed*, 288 F.2d 844, 846 n. 5 (D.C. Cir. 1961). It has been invoked to permit a prisoner to raise the issue of his right to counsel at a hearing to revoke his parole.

Hurley v. *Reed, supra; Washington* v. *Hagan,* 287 F.2d 332 (3d Cir. 1960). And in *Miley* v. *Lovett,* 193 F.2d 712 (4th Cir. 1952), the Fourth Circuit, facing a problem analogous to that in these cases, held that where the right of an army officer to test his involuntary continuation in the service on habeas corpus was challenged, the court could grant a declaratory judgment.

Yet no case has been found which actually grants declaratory post-conviction relief in the absence of habeas corpus. A number of courts have considered the question and summarily denied declaratory judgment. See, *e.g., Forsythe* v. *Ohio,* 333 F.2d 678 (6th Cir. 1964); *Waldon* v. *Iowa,* 323 F.2d 852 (8th Cir. 1963).

Typically, the courts have given no more than cursory attention to the question. See generally, Note, *Habeas Corpus, Custody and Declaratory Judgment,* 53 Va. L. Rev. 673, 687-701 (1967). When a reason is given it invariably is just a restatement of the already-reached conclusion that declaratory judgment simply is not appropriate since the purpose of the remedy was said to be "to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated." *Hurley* v. *Lindsay,* 207 F.2d 410, 411 (4th Cir. 1953); see *Clark* v. *Memolo,* 174 F.2d 978 (D.C. Cir. 1949). In recognition of the compelling considerations militating in favor of immediate attack on allegedly invalid criminal convictions the Fourth Circuit has been careful to keep the question of the availability of declaratory relief open:

> The present availability of some remedy is certainly highly desirable. While the challenged conviction imposes no present detriment upon Foraker, it is almost

> certain that he will suffer detriment from it in the future unless death in the interim period relieves him of all his burdens. If he lives so long, he certainly would be allowed to attack the judgment in a collateral proceeding once he begins to serve it or even as soon as it has an effect upon his eligibility for parole. By that time, however, his court-assigned lawyer, the Judge before whom he was tried, the Commonwealth's attorney and the court reporter may all have died, or the case become so dim in their memories that they could contribute nothing as witnesses. . . .
>
> Instead of leaving the matter in limbo over so long a period of time, the desirability of some present inquiry when potential witnesses are available and recollections relatively fresh has an urgent obviousness.

Foraker v. *Virginia*, No. 9950 (4th Cir., Dec. 9, 1966), at 2-3.

What the court said of John Foraker applies with equal force to the cases of Robert Rowe and Clyde Thacker. Their very right to release from confinement once their allegedly unconstitutional sentences begin to affect their parole eligibility, may depend on whether they are allowed to litigate the legality of their convictions now, while evidence remains available and memories remain relatively sharp.

A. An Independent Basis for Jurisdiction Exists in the Civil Rights Act, 28 U.S.C. § 1343, Which Confers Power on the Federal Courts to Protect the Full Range of Fourteenth Amendment Rights.

The Declaratory Judgment Act is not a source of jurisdiction; an independent basis of federal subject matter

jurisdiction must exist. *Schilling* v. *Rogers*, 363 U.S. 666, 677 (1960). 28 U.S.C. § 1343 (1964), provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

A civil action for damages or injunctive relief "or other proper proceeding for redress" for the deprivation of such rights is authorized by 42 U.S.C. § 1983 (1964). Together these two statutes are designed to protect the full range of Fourteenth Amendment rights. See *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Hague* v. *CIO*, 307 U.S. 496, 526 (1939) (opinion of Stone, J.). Rowe and Thacker have made substantial allegations to the effect that they have been convicted of crimes by a procedure violative of due process. If there is no other way to protect their Fourteenth Amendment rights, declaratory relief must be afforded them. The federal courts have jurisdiction to hear their petitions for declaratory relief.

B. Rowe and Thacker Have a Clearly Justiciable Controversy With Virginia Over the Constitutional Validity of Judgments Imposed Upon Them by That State. Their Controversy Becomes Less Ripe With the Passage of Time, Which May Ultimately Moot the Dispute.

The Declaratory Judgment Act cannot, of course, be used to circumvent the constitutional requirement of a "case or controversy." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227 (1937). The cases at bar present archetypal examples of fully justiciable controversies where the grant of declaratory relief can forestall inevitable prejudice to one party or the other.

The essence of a "case or controversy" within the meaning of Article III is a proceeding (1) involving an actual dispute over legal relations, (2) between parties of clear adverse interest, which (3) is presented in sufficiently concrete form that courts may appropriately determine the relief to which the parties are entitled. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-41 (1937); Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems,* 6 Vand. L. Rev. 79, 84-96 (1952). The rule seeks

> to insure that the judiciary will have the benefit of deciding legal questions in a truly adversary proceeding in which there is the "impact of actuality," and in which the contentiousness of the parties may be relied upon to bring to light all relevant considerations.

Parker v. *Ellis,* 362 U.S. 574, 592 (1960) (Warren, C.J., dissenting) (footnotes omitted).

These requirements are clearly fulfilled here. See Note, 53 Va. L. Rev. 673, 688-92 (1967). The questions which Rowe and Thacker seek to have adjudicated are "appropriate for judicial determination." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240 (1937). They are "legal" questions, of the type which courts decide all the time, and which normally would be justiciable on habeas corpus. The adversity of the parties and their interest in the outcome of the litigation is clear.

Rowe and Thacker are prisoners in state custody. They *seek to attack allegedly* unconstitutional judgments already entered against them which presently affect the nature of their custody and will some day be the only basis for their custody. The state has an interest in upholding its criminal judgments and in retaining custody over convicted felons. The parties are clearly adverse.

Just as clearly the controversy is "ripe" for adjudication at this point. The ripeness requirement is desiged to insure that courts do not decide hypothetical controversies, and that the clash of interests is presented in sufficiently concrete form that the rights asserted by the parties and the relief to which they may be entitled can clearly be discerned by the court. See *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89 (1947); *Muskrat* v. *United States,* 219 U.S. 346, 357 (1911). Here the clash of interests is clear, and Rowe and Thacker claim the right to specific and definite relief—invalidation of their convictions, so that the state will be prevented from depriving them of liberty under the judgments without due process of law. There is nothing hypothetical about these cases; they are no less ripe for adjudication in a constitutional sense than were *Martin* v. *Virginia,* 349 F.2d 781 (4th Cir. 1965), and *Williams* v.

Peyton, 372 F.2d 216 (4th Cir. 1967). Indeed, a refusal to adjudicate the claims at the present time could effectively, if not legally, moot them. The passage of time will render the necessary fact-finding inevitably more difficult and perhaps impossible. Precisely this consideration moved this Court to grant declaratory relief in the first case upholding the constitutionality of the Federal Declaratory Judgment Act:

> [P]laintiff points to the danger that it may lose the benefit of evidence through disappearance, illness or death of witnesses; and meanwhile, in the absence of a judicial decision with respect to the alleged disability, the plaintiff in relation to these policies will be compelled to maintain reserves in excess of $20,000.

Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227, 239 (1937).

The case for declaratory relief is even stronger here than it was in *Haworth*, for the loss of evidence in the event the litigation is delayed will affect not merely 20,000 dollars worth of insurance benefits, but the liberty of two men and the power of society to impose restraints for its own protection. And if Rowe and Thacker were to be ultimately successful in their attacks after being required to wait until habeas corpus became available, they would not merely be required to keep a certain amount of money unnecessarily in reserve, but to serve time in prison on unconstitutional convictions. This court can prevent the full materialization of these presently and potentially unfortunate and unconstitutional effects by ordering the courts below to hear and decide these cases for declaratory relief.

C. The Federal Courts Have the Power to Declare the Rights of Rowe, Thacker and the Commonwealth of Virginia. That Power Should Be Exercised When the Interests of Rowe, Thacker, the Commonwealth of Virginia and the United States Are Best Served by an Immediate Determination of the Controversy.

The Declaratory Judgment Act is not mandatory. The courts have discretion to refuse to entertain petitions for declaratory relief in appropriate cases *Public Affairs Associates, Inc.* v. *Rickover,* 369 U.S. 111, 112 (1962); *Brillhart* v. *Excess Ins. Co.,* 316 U.S. 491, 494 (1942). Where, however, the purposes of the act will be served by granting declaratory relief, the courts should exercise their discretion to hear such cases liberally. *Aetna Cas. & Sur. Co.* v. *Quarles,* 92 F.2d 321, 324 (4th Cir. 1937). Abstention from decision is clearly not appropriate. Typically courts will exercise their discretion not to hear justiciable cases for declaratory judgment when the decree would not finally settle the controversy between the parties, *e.g., Williams* v. *Ball,* 294 F.2d 94 (2d Cir. 1961), *cert. denied,* 368 U.S. 990 (1962), where the adjudication would cause inconvenience to some parties, *e.g., Kozol* v. *Lumbermens Mut. Cas. Co.,* 201 F. Supp. 718 (D. Mass. 1962), or where the parties may be said to be engaging in "procedural fencing," *e.g., Shell Oil Co.* v. *Frusetta,* 290 F.2d 689, 692 (9th Cir. 1961). None of these inhibiting circumstances is present here. On the contrary, the Court is presented with a case where the essential policies of the Declaratory Judgment Act will be served by granting declaratory relief to the parties. Professor Borchard, one of the drafters of the federal act, has articulated the criteria for the exercise of the courts' discretion in these cases. He has said that declaratory judgment should be granted

(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

BORCHARD, DECLARATORY JUDGMENTS 299 (2d ed. 1941). Both these criteria are satisfied here. The court has an opportunity to settle now, when the factual issues may be presented in far sharper fashion than ever again, the right of the state of Virginia to incarcerate or otherwise restrain Robert Rowe and Clyde Thacker on the basis of the attacked convictions.

Concern for federal-state relations has been one factor which has apparently stayed the hand of some federal courts faced with the question whether declaratory judgment may be employed by prisoners seeking post-conviction relief. This concern has been expressed in part as a fear that declaratory judgment might be used to circumvent the federal habeas requirement, see 28 U.S.C.A. § 2254 (Supp. 1967), that state prisoners exhaust their state remedies before applying for federal relief. See *Waldon* v. *Iowa*, 323 F.2d 852 (8th Cir. 1963). Clearly, however, early federal adjudication is likely to produce far less interference with state criminal procedures than late adjudication, when the state may be hard-pressed to uphold its judgment or to retry the prisoner. Indeed, since habeas corpus itself is in the nature of an equitable proceeding, *Fay* v. *Noia*, 372 U.S. 391, 438 (1963), it is possible that the state might be able to invoke the doctrine of laches to protect its judgment in a case where a prisoner deliberately delayed seeking the writ until the evidence had so

faded that the state was unable effectively to defend its criminal process or to retry him. Compare *United States* v. *Rockower*, 171 F.2d 423 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949) (laches applied in coram nobis proceeding); *United States* v. *Moore*, 166 F.2d 102 (7th Cir.), *cert. denied*, 334 U.S. 849 (1948) (same). Recognition of the state's interest in not being forced to defend its criminal judgments when the defendant has deliberately rendered it more difficult to do so by delaying his application for relief is inconsistent with the notion that early federal adjudication of federal rights will exacerbate federal-state relations.

Moreover, while the Civil Rights Acts do not require the exhaustion of state remedies, see *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), such a condition would seem to be an appropriate exercise of the federal courts' discretion in declaratory post-conviction relief cases. The Supreme Court has expressed a strong policy in favor of affording the states "the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction." *Fay* v. *Noia*, 372 U.S. 391, 438 (1963). The courts can give effect to this policy by requiring prisoners who seek declaratory relief to have exhausted their state remedies first.

Of course, the notion of exhaustion of state remedies presupposes the existence of an *adequate* remedy in the state courts, *Young* v. *Ragen*, 337 U.S. 235, 239 (1949), and habeas corpus petitioners are only required to exhaust those remedies which are presently available to them, *Fay* v. *Noia*, 372 U.S. 391, 435 (1963); *Williams* v. *Peyton*, 372 F.2d 216 (4th Cir. 1967). Thus if the state provided no form of post-conviction relief until the prisoner could satisfy the traditional custody requirement, there would be

no state remedies to exhaust. To the extent, however, that the availability of a federal declaratory remedy would provide an impetus to the states to reexamine the timing of their collateral attack procedures and to permit attack at the earliest possible time, it would have the salutary effect of opening all courts to prisoners at the time when their claims may be most effectively litigated. Indeed, a number of state legislatures and courts, recognizing the overwhelming considerations in favor of early factual hearings on claims of denials of constitutional rights in the criminal process, have abandoned technical time limitations on the availability of post-conviction relief. See Or. Rev. Stat. § 138.510 (1967); Md. Ann. Code art. 27, § 645A (1967); *Simon* v. *Director*, 235 Md. 626, 201 A.2d 371 (1964); *State* v. *Losieau*, 180 Neb. 696, 144 N.W.2d 435 (1966); *State ex rel. Goodchild* v. *Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965); *Commonwealth ex rel. Stevens* v. *Myers*, 419 Pa. 1, 213 A.2d 613 (1965); *State ex rel. Holm* v. *Tahash*, 272 Minn. 466, 139 N.W.2d 161 (1965); *In Re Chapman*, 43 Cal. 2d 385, 273 P.2d 817 (1954).

The invocation of declaratory judgment for state prisoners whose claims are considered premature under the habeas corpus custody requirement would also promote greater stability of criminal judgments. Where the federal hearing, if one is necessary, is held while the facts are still readily discoverable and the evidence is relatively fresh, the states will be in a better position to defend their judgments against the claims of prisoners who can make out a prima facie case of denial of constitutional rights. In many situations—for example, where long-continued exclusion of Negroes from juries is demonstrated, see *Norris* v. *Alabama*, 294 U.S. 587 (1935), or where counsel is appointed

for an indigent so late that only scant trial preparation is possible, see *Twiford* v. *Peyton*, 372 F.2d 670, 673 (4th Cir. 1967)—the prisoner can shift the burden of proof to the state by making out a prima facie case. The passage of time may obscure the actual facts sufficiently that the state is helpless to demonstrate compliance with the requirements of due process of law or lack of prejudice to the prisoner.

Furthermore, a degree of conclusive effect could be given to the federal declaratory judgment, so that state criminal judgments could rest secure following one full, fair federal review. The doctrine of res judicata poses a number of intricate problems in the context of the declaratory remedy for state prisoners, which deserve exploration here. Underlying criminal judgments which have been obtained in violation of constitutional rights are, of course, entitled to no res judicata effect in a collateral proceeding. Nor do federal courts in such proceedings accord res judicata effect to state post-conviction remedies. *Fay* v. *Noia*, 372 U.S. 391, 424 (1963). Of course, deference is paid to state post-conviction remedies and to the state criminal process in general by the rule applied in federal habeas corpus that where the factual claim has been litigated fully and fairly in the state courts no new hearing should be held by the federal habeas court. *Townsend* v. *Sain*, 372 U.S. 293 (1963).

The same reasoning would apply to the declaratory post-conviction remedy, even though the courts would not be acting under their habeas jurisdiction. The exhaustion requirement would be imposed in the discretion of the federal courts as a matter of comity, and it would not deprive them of the power of review. The strong federal policy favoring full federal judicial review of claimed denials

of federal rights would justify a refusal by the court in a declaratory proceeding to give res judicata effect to state post-conviction remedies. *Cf. United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506 (1940) (public policy exception to res judicata). However, considerations of proper deference to state determinations would support a discretionary refusal to entertain declaratory judgment actions where the *Townsend* criteria for a federal habeas hearing are not met.

A federal declaratory judgment upholding a conviction would be entitled to the same degree of conclusiveness in a later habeas corpus proceeding as would an earlier denial of habeas relief. Such a rule could mesh with 28 U.S.C.A. § 2244 (Supp. 1967) to reduce friction between federal and state courts, and to mitigate the burden placed upon federal courts by habeas petitions, by imparting greater stability to state criminal judgments, while at the same time permitting the federal claims of state prisoners to be heard as early as possible, in order to safeguard the fairness of the proceedings.

IV.

The Constitutionality of Sentences Imposed by a State Is Never a Merely Academic Question Since the State Now and Forever Asserts the Right to Treat the Sentence as a Valid Basis for State Action.

The Commonwealth of Virginia concedes that a present remedy for Rowe and Thacker is desirable from the point of view of the prisoners and the Commonwealth. Brief for Petitioner, 9. Virginia's only contention is that provision of a remedy requires legislative revision. *Id.* at 9-11. Cali-

fornia in an *amicus* brief, pp. 16-20, contends that a present federal remedy is undesirable. Interestingly enough California courts do not now follow the *McNally* rule. *In re Chapman,* 43 Cal. 2d 385, 273 P.2d 817 (1954). The California contention thus is that those California prisoners who are not yet serving their attacked sentences and who have failed to secure a favorable adjudication of their post-conviction claims in the state courts should not be afforded the normal opportunity to seek a federal hearing at the conclusion of the state proceedings but should wait until they enter upon technical sentence service.

If the prisoner's guilt presented a sufficiently justiciable, non-academic question for the state to prosecute him and for a court to sentence him, it is difficult to appreciate an argument that claimed unconstitutionality in the process by which guilt was determined and sentence imposed presents merely an academic question. But California contends that the question is too academic for federal consideration now since intervening events may relieve the prisoner from ever entering upon actual iron-bar service.

> The claims of Rowe and Thacker may never need to be heard. Before they commence their consecutive sentences they may die, be pardoned, or abandon their claim because they receive parole.

Brief for Amicus Curiae, 18. To assert that death renders a question academic is only to assert a truism. All cases that are personal to litigants are rendered moot by death. Moreover, only 676 of 136,864 discharges from prison in 1965 (0.5%) resulted from death. UNITED STATES DEPT. OF JUSTICE, NATIONAL PRISONER STATISTICS 12. Only 13 (0.009%) resulted from full pardons. *Ibid.* Moreover, it is

not clear that even a pardon for innocence frees the inmate from the possibility of being treated as a multiple offender on the basis of the offense from which he has been pardoned. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 170 (Tent. draft 1967).

In fact, each sentence attacked here will either result in continued iron-bar custody being imposed or in qualifying eligibility for or the possibility of parole (unless of course death or full pardon intervenes). Even if parole is granted as a matter of the parole board's discretion the validity of the sentences has not become an academic question. To the extent that the questioned sentences affect either the restrictions of the parole or its length, this Court has already held that habeas corpus is available to the parolee. *Jones* v. *Cunningham*, 371 U.S. 236 (1963). Moreover, parole itself does not discharge the prisoner from the obligation of iron-bar service of the sentences. A violation of the parole conditions can result in his recommitment to iron-bar custody. The Superintendent in this case will confine Thacker on the sentences now attacked because of a 1964 parole revocation. (A. 5-6). In no sense then can it be said that to adjudicate presently the validity of these sentences is to resolve only an academic question—even if the present substantial impact of the sentences on the prisoner is disregarded.

Moreover, Rowe and Thacker can never be discharged totally from these unconstitutional sentences without some form of adjudication. If they are released from iron-bar custody and discharged from parole custody, the sentences will still play a part in the extent of their iron-bar custody if they ever are found to be in violation of the law again.

Rowe, for example, will be treated as a third rather than a second offender which in Virginia makes him liable to greatly increased punishment, VA. CODE ANN. § 53-296 (1967) and in other states to a life sentence. *E.g.*, COLO. REV. STAT. § 39-13-1 (1964). (Multiple offender statutes are collected and their impact analyzed in AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 160-71 (Tent. draft 1967).)

These sentences will have other substantial impacts upon the prisoner if he is released into society. *Parker* v. *Ellis*, 362 U.S. 574, 577, 593-94 (1960) (dissenting opinion). See generally, Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE CORRECTIONS 83-92 (1967). The removal of any or all of these disabilities will require judicial adjudication. *Ibid.*

The question is not whether an adjudication of the validity of these sentences will be necessary but when it should take place and the form it should take. For these two men now behind iron bars in the custody of the petitioner, the Great Writ is the present appropriate remedy.

Conclusion

Rowe and Thacker are prisoners in the custody of the Commonwealth of Virginia. They seek to attack present judgments upon which sentences they are not yet serving depend. These convictions have substantial adverse effects on them now. Unless a present remedy is provided, the sentences will have to be served while they are being attacked and the chances for success of an attack on them will

be materially reduced. Present treatment of Rowe and Thacker in the penal system is affected by these sentences no matter when they are scheduled to be served. Federal habeas corpus is available to vindicate their claims that their constitutional rights have been violated.

Their allegations if true show material violations of their right to due process. The need for an immediate determination of the validity of these convictions is apparent. The federal courts have the power under the Declaratory Judgment Act to make this determination even if habeas corpus is not available.

Rowe and Thacker respectfully request that the judgment of the Court of Appeals for the Fourth Circuit remanding their cases with instructions to determine the validity of the challenged sentences and judgments of conviction and, if they are found invalid, to remove the burdens of these sentences and judgments from them, be affirmed.

Respectfully submitted,

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APPENDIX

Federal Habeas Corpus Legislation

Judiciary Act of 1789, Chapter 20, 1 Stat. 81:

Sec. 14. *And be it further enacted*, That all the beforementioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, (c) and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment: *Provided*, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Act of February 5, 1867, Chapter 28, 14 Stat. 385:

CHAP. XXVIII.—*An Act to amend "An Act to establish the Judicial Courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writ-

APPENDIX

Federal Habeas Corpus Legislation

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ing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas corpus a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the Constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies

already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default of such, as the judge hearing said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

Revised Statutes of 1874, Chapter 13, 13 Stat. 142:

SEC. 751. The Supreme Court and the circuit and district courts shall have the power to issue writs of habeas corpus.

SEC. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

SEC. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States,

or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

SEC. 754. Application for a writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

SEC. 755. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

SEC. 756. Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.

SEC 757. The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

SEC. 758. The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

SEC. 759. When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

SEC. 760. The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

SEC. 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

SEC. 762. When a writ of habeas corpus is issued in the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed, or confined, or in custody, by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceeding, to be prescribed by the court or justice, or judge at the time of granting said writ, shall be served on the attorney-general or other officer prosecuting the pleas of said State, and due proof of such service shall be made to the court, or justice, or judge before the hearing.

SEC. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

SEC. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the last clause of the preceding section.

SEC. 765. The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default thereof, by the court or judge hearing the cause.

SEC. 766. Pending the proceedings or appeals in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void. [28 U.S.C. §§ 453-462 (1925), which was before the Court in *McNally* v. *Hill*, 293 U.S. 131 (1934), was substantially identical in language to the Revised Stat-

utes of 1874, §§ 753-762, 13 Stat. 142, except that the word "party" in § 761 was replaced by the word "case" in § 461. The number changes of the sections correspond directly. Additions and changes in other sections of the chapter are not important in this case.]

28 U.S.C. Sections 2241, 2243 (1964):

§ 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission,

order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

§ 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

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Supreme Court of the United States

October Term, 1967

No. 802

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

ROBERT ELMER ROWE,

Respondent.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

CLYDE MASON THACKER,

Respondent.

REPLY BRIEF FOR PETITIONER

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
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Supreme Court Building
Richmond, Virginia 23219

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Respondent.

REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

The Superintendent of the Virginia State Penitentiary, by counsel, files herewith his reply brief to the brief filed on behalf of the respondents. The respondents have sug-

gested that the wrong statute will be found on page 3 of the petitioner's opening brief, to-wit: 28 U.S.C., Section 2254. The petitioner would suggest that in addition to 28 U.S.C., Section 2254; 28 U.S.C., Section 2241 is also applicable to this case, and the same is herein set forth.

OTHER STATUTE INVOLVED

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or ex-

emption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105." (28 U.S.C., Section 2241).

ARGUMENT

I.

The Writ Does Not Lie, for the Reason That the Prisoners Are Not in Custody Under the Convictions Which They Attack.

The principal contention of the prisoners in their brief initially is to the effect that their sentences are invalid and that they state a prima facie case in their petitions. With this we have previously agreed, and it is therefore unnecessary to consider that which is said in the first eighteen pages of the respondents' brief.

It is noted with a great deal of interest that on page 18 of the respondents' brief they complain of delays in the judicial process. There are inherent delays in bringing a case on for plenary hearing, but the delays in the Federal system far exceed the delays in the courts of the Commonwealth of Virginia. A prisoner can expect to receive a plenary hearing within 45 to 60 days after the respondent has filed an answer. In the Federal courts, the delay sometimes is six months to a year from the time of the filing of the answer by the Attorney General of Virginia. Delay is unfortunate, but it is caused by the fact that the majority of the petitions filed are frivolous, but hearings must be held in connection with the same.

The comments made by respondents in their brief commencing on page 20 are most interesting, but unsupported

by any evidence in the record before this Court. There was no testimony or evidence relative to the methods of classification employed in the Virginia penal system. There was no testimony relative to the type of institutions operated in Virginia for the incarceration of convicted felons and misdemeanants. Indeed, there is no such thing as an "Honor Camp" mentioned on page 21 of the respondents' brief. It is submitted that the argument contained on page 20 through 25 of the respondents' brief is unsupported by any credible evidence in the record before this Court and that the same should be disregarded.

The principal point in this case is the fact that the prisoners are not "in custody" under the sentences of which they complain. The prisoners are not therefore restrained of their liberty by the sentences which they attack. This Court has consistently held to the doctrine that the prisoner must be "in custody" in order to attack a sentence either by way of habeas corpus or by the provisions of 28 U.S.C., Section 2255. *McNally* v. *Hill,* 293 U.S. 131 (1934); *Holiday* v. *Johnston,* 313 U.S. 342 (1941); *Heflin* v. *United States,* 358 U.S. 415 (1959); *Fay* v. *Noia,* 372 U.S. 391; *Jones* v. *Cunningham,* 371 U.S. 236 (1963).

If this rule of law is to be changed, it is submitted that the appropriate approach is that undertaken by the Commonwealth of Virginia, whose Legislature has just recently adjourned. The Senate of Virginia and the House of Delegates passed Senate Bill No. 44, which has not yet been signed by the Governor, and is therefore not the law of the Commonwealth at the time this brief is being prepared. The bill will be signed by the President of the Senate and the Speaker of the House of Delegates on March 29, 1968, and thereafter will presumably be signed by the Governor of Virginia. The Court will be notified when the same is

accomplished. For the convenience of the Court, Senate Bill 44, as passed by the Virginia legislature, will be found in the appendix to this brief. Virginia by enacting this statute and amending the provisions of Section 8-596 of the Code of Virginia has provided that a prisoner may attack a sentence which is to be served in the future. This legislation deals effectively with all the problems so ably presented in the respondent's brief. It is manifest, therefore, that if the doctrine of *McNally* is to be altered, the same should be accomplished by an appropriate act of Congress and not by judicial legislation.

The writ of habeas corpus is limited by the provisions of 28 U.S.C. 2254 to cases wherein the prisoner is "in custody" under the sentence which he attacks. In both of the cases before this Court, the prisoner is serving another sentence other than the sentence of which he complains.

This matter is not governed by this Court's decision in *Case* v. *Nebraska,* 380 U.S. 924 (1965). This Court is being called upon to enlarge the scope of the writ of habeas corpus, and this is admitted by the opinion of the United States Court of Appeals for the Fourth Circuit, wherein it is stated that its decision represents "a significant departure from the historic conception that the writ of habeas corpus was available only if the Court's order would procure the immediate release of the prisoner."

This most drastic step, which is suggested by the respondents should not be made by this Court, for the respondents seek judicial amendment of an act of congress. If Congress desires to change the rule in *McNally,* it can do so in the same manner that the Virginia General Assembly has accomplished the same.

For these reasons, it is submitted that the decision of the court below should be reversed.

II.

The Prisoners Are Not Entitled to Declaratory Relief.

It is suggested by respondents' opening brief that the habeas corpus petitions should be treated as petitions for relief by way of declaratory judgment. The Federal Declaratory Judgment Act, 28 U.S.C. 2201, provides as follows:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

This very argument was advanced in the United States Court of Appeals for the Fourth Circuit in *Martin* v. *Virginia,* 349 F. 2d 781 (4th Cir., 1965). The argument was rejected.

In order for a Federal Court to consider a motion for declaratory judgment, the same must present a case that is appropriate for judicial determination. Here, there is no concrete case admitting of an immediate and definitive determination of the legal rights of the parties. *Aetna Life Insurance Company* v. *Haworth,* 300 U.S. 227 (1937). There is nothing in the Federal Declaratory Judgment Act itself which would lead this Court to determine that this question of the validity of a prisoner's sentence to be served in the future should be open in a declaratory judgment proceeding.

In the case of *Clark* v. *Memolo,* 174 F. 2d 978 (D.C. Cir., 1949), the Court observed "It is well settled that the

Declaratory Judgment Act does not confer or extend jurisdiction over an area not already covered, nor can it be used to give relief indirectly which could not be given directly. It does not enlarge the jurisdiction of the District Courts. * * *"

Moreover, in *Hurley* v. *Lindsay,* 207 F. 2d 410 (4th Cir., 1953), the Court said:

> "* * * As was well said by Judge Watkins, speaking for the Court of Appeals of the District of Columbia Circuit in *Clark* v. *Memola,* 85 U.S. App. D.C. 65, 174 F. 2d 978, 981, 'It was the primary purpose of the [Declaratory Judgment] act, [28 U.S.C.A. §§ 2201, 2202] to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated.' "

Here, it is quite clear that the rights of these inmates have been previously adjudicated. They have both been tried and convicted by competent courts of the Commonwealth of Virginia. It was clearly not the intention of Congress to permit a readjudication of rights under the Federal Declaratory Judgment Act. It is only by way of habeas corpus that a prisoner can attack the validity of a judgment. In the absence of a "case or controversy" it is therefore manifest that the provisions of the Federal Declaratory Judgment Act may not be employed as a substitute for a writ of habeas corpus.

CONCLUSION

It is submitted that it has been demonstrated clearly and concisely that the prisoners are not "in custody" and that consequently the writ of habeas corpus does not lie in a Federal Court. Moreover, it has been demonstrated that the court below departed from established principles of

law enunciated by this Court, which principles have been followed for many years by this Court and by other Circuit Courts of Appeals. It is manifest that if any change should be made, such change should be made by Congress.

For these reasons, it is respectfully submitted that the judgments of the court below should be reversed.

Respectfully submitted,

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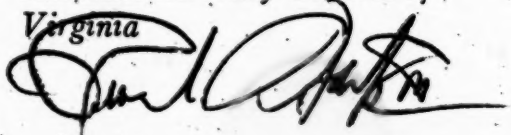
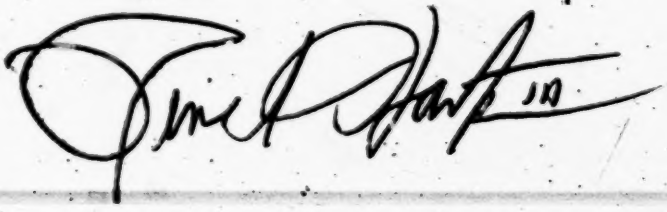


CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 22nd day of March, 1968, I mailed a copy of the foregoing Brief by first class mail to Mr. John J. Kirby, Jr., 4201 31st Street, Apartment 808, Arlington, Virginia, and Mr. Thomas S. Currier, University of Virginia, School of Law, Charlottesville, Virginia, counsel for the respondents herein.

RENO S. HARP, III
Assistant Attorney General of Virginia



APPENDIX

Be it enacted by the General Assembly of Virginia:

1. That § 8-596, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 8-596. When and by whom the writ granted; what petition to contain.—(*a*) The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court or corporation court, or any judge of either in vacation, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.*

* * *

(*b*) (*1*) *With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97 of the Code of Virginia, only the court ~~or~~ any judge thereof in vacation which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the original trial court, may be held at any court within the circuit or corporation of such original trial court as designated by the judge thereof.*

(*2*) *Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate any and all previous applications of like nature and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.*

(*3*) *Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to*

be served subsequently to the sentence currently being served by petitioner.

(4) In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court or judge thereof in vacation may make its determination whether such writ should issue on the basis of the record.

(5) Such court or judge shall give his findings of fact and conclusions of law following his determination on the record or after hearing, to be made a part of the record and transcribed.

(6) If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

SUPREME COURT OF THE UNITED STATES

No. 802.—October Term, 1967.

C. C. Peyton, Superintendent of the Virginia State Penitentiary, Petitioner, *v.* Robert Elmer Rowe et al. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May 20, 1968.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This case concerns the scope of 28 U. S. C. § 2241 (c)(3), which specifies that the United States District Courts may issue writs of habeas corpus on behalf of prisoners who are "in custody in violation of the Constitution . . . of the United States." The question presented is whether a district court may entertain a petition for a writ of habeas corpus from a prisoner incarcerated under consecutive sentences who claims that a sentence that he is scheduled to serve in the future is invalid because of a deprivation of rights guaranteed by the Constitution. The Court considered this issue in *McNally* v. *Hill*, 293 U. S. 131 (1934), and held that the habeas corpus statute does not authorize attacks upon future consecutive sentences. We granted certiorari in this case to re-examine *McNally*. 389 U. S. 1035 (1968). We conclude that the decision in that case was compelled neither by statute nor by history and that today it represents an indefensible barrier to prompt adjudication of constitutional claims in the federal courts.

Respondents Robert Rowe and Clyde Thacker are serving prison terms in the Virginia State Penitentiary. In June 1963 Rowe was sentenced to 30 years' imprisonment

after a jury found him guilty of rape. Subsequently, he pleaded guilty to an indictment charging him with felonious abduction with intent to defile arising from the same events which had led to the rape conviction.[1] He was sentenced to a 20-year term on this conviction to run consecutively to the 30-year sentence. After exhausting state remedies,[2] Rowe petitioned for a writ of habeas corpus in the United States District Court for the Western District of Virginia. He did not attack the rape conviction, but alleged that the conviction for felonious abduction was constitutionally defective because he had been subjected to double jeopardy, because his plea of guilty had been involuntary, because the indictment had failed to state an offense and because he had been inadequately represented by trial counsel. Without reaching the merits of Rowe's claims, the District Court denied relief. Applying *McNally*, the court found Rowe was then detained under the 30-year sentence for rape. Since he did not claim that sentence was invalid, it was held that he was not then "in custody" under an unconstitutionally imposed sentence within the meaning of § 2241. The court concluded that it could not entertain Rowe's challenge to the conviction for felonious abduction until he was confined under the sentence imposed for that conviction. That time would not arrive until 1993.[3]

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[1] Rowe's initial plea of double jeopardy had been overruled by the trial court.

[2] Rowe had filed an application for state habeas corpus relief in the Virginia Supreme Court of Appeals. This petition was denied under Virginia's version of the *McNally* rule. See *Peyton v. Williams*, 206 Va. 595, 145 S. E. 2d 147 (1965). Subsequent to the decision below, the Virginian Legislature enacted a statute, effective June 28, 1968, which will abolish the rule of prematurity in the State. See n. 17, *infra*.

[3] If Rowe receives full credit for "good time," the 30-year sentence will expire in 1982. Under the two sentences, he will be eligible for parole in 1974. If he were relieved of the 20-year term, he would be eligible for parole in 1970. See Va. Code Ann. § 53-251 (1967).

Thacker's § 2241 petition in the Eastern Division of Virginia met a similar fate. He is imprisoned under a number of sentences totaling more than 60 years. He asserted that three consecutive five-year sentences imposed for housebreaking in 1953 were invalid because of inadequate representation by counsel at the time he entered pleas of guilty.[4] Finding that Thacker's attack on these sentences was premature because he had not begun to serve them, the District Court dismissed the petition "without prejudice to Thacker's reapplication at the proper time." Under *McNally*, the "proper time" will be in 1994 when Thacker commences service of the first of the three sentences he challenges.[5]

The Court of Appeals for the Fourth Circuit consolidated the two cases. After a hearing *en banc*, it reversed and remanded them to the District Courts. 383 F. 2d 709 (1967). Recognizing that the District Courts had correctly applied *McNally*, the Court of Appeals declined to adhere to that decision. Writing for a unanimous court, Chief Judge Haynsworth reasoned that this Court would no longer follow *McNally*, which in his view represented a "doctrinaire approach" based on an "old jurisdictional concept" which had been "thoroughly rejected by the Supreme Court in recent cases."[6] *Id.*,

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[4] These sentences were originally suspended, but the suspension was revoked in 1956.

[5] If Thacker does not receive good-time credit, he will commence service of the three sentences in 2009. He will be eligible for parole in 1976.

[6] The decision of the Court of Appeals in the present case was preceded by two cases in which it held that § 2241 (c)(3) permits attack upon a future consecutive sentence which affects or may affect a prisoner's current parole eligibility. *Williams* v. *Peyton*, 372 F. 2d 216 (C. A. 4th Cir. 1967); *Martin* v. *Virginia*, 349 F. 2d 781 (C. A. 4th Cir. 1965). In *McNally*, the Court rejected the prisoner's argument that he was entitled to habeas corpus relief because he would be eligible for parole if the challenged sentence were invalidated. *McNally* v. *Hill*, 293 U. S., at 134, 140. In

at 714. We are in complete agreement with this conclusion and the considerations underlying it.

The writ of habeas corpus is a procedural device for subjecting executive,[7] judicial,[8] or private[9] restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under the law.[10] In In England where it originated and in the United States, this high purpose has made the writ both the symbol and guardian of individual liberty. 3 Blackstone, Commentaries *131–138; see *Ex parte Bollman*, 4 Cranch 75 (1807); *Ex parte Lange*, 18 Wall. 163 (1874); *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Fay* v. *Noia*, 372 U. S. 391 (1963).

The habeas corpus jurisdiction of the federal courts is enumerated in 28 U. S. C. § 2241. Like the predecessor

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Williams and *Martin*, the Court of Appeals concluded that this Court's decision in *Jones* v. *Cunningham*, 371 U. S. 236 (1963), represented a departure from this narrow reading of the habeas corpus statute.

[7] *E. g.*, *Darnel's Case* ["Five Knights' Case"] (K. B. 1627), III Howell's State Trials 1–59 (1816); *Ex parte Milligan*, 4 Wall. 2 (1866). The proceedings in *Darnel's Case* are summarized in D. Meador, Habeas Corpus and Magna Carta 13–16 (1966).

[8] *E. g.*, *Bushell's Case*, 3 Keb. 358, 84 Eng. Rep. 1023 (K. B. 1670); *Walker* v. *Wainwright*, 390 U. S. 335 (1968).

[9] *E. g.*, *Rex* v. *Clarkson*, 1 Burr. 606, 93 Eng. Rep. 625 (K. B. 1722); see *Ford* v. *Ford*, 371 U. S. 187 (1962).

[10] The indignation aroused by the decision in *Darnel's Case*, *supra*, n. 7, led to enactment in 1628 of the Petition of Right, 3 Car. I, c. 1, which condemned a return reciting that imprisonment was by "speciale Mandatum Domini Regis" as insufficient under "the law of the land." See W. Church, Habeas Corpus 8–9 (2d ed. 1893). In the United States, the Act of February 5, 1867, c. 28, 14 Stat. 385, made the writ available to "any person . . . restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."

statute which controlled in *McNally*,[11] § 2241 provides for the issuance of writs on behalf of persons "in custody." But the statute does not attempt to define the terms "habeas corpus" or "custody." Confronted with this fact, the Court in *McNally* reasoned that "[t]o ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law . . . and to the decisions of this Court interpreting and applying the common law principles . . . ." *McNally* v. *Hill*, 293 U. S., at 136. We need not look very far to discover three principal characteristics of the writ as it had developed in the federal courts even before the decision in *McNally*. First, though the writ in England had been utilized largely to secure the admission to bail and discharge of prisoners,[12] its major office in the federal courts since the Civil War has been to provide post-conviction relief.[13] Second, the partial codifications of the common-law writ in England and more recent legislation in this country have contained specific and detailed

[11] Rev. Stat. § 753 (1875). For a collection and discussion of the federal habeas corpus statutes from the original Judiciary Act of 1789 to 1953, see G. Longsdorf, The Federal Habeas Corpus Acts Original and Amended, 13 F. R. D. 407 (1953).

[12] The celebrated Habeas Corpus Act of 1679, 31 Car. II, c. 2, was concerned exclusively with providing an efficacious remedy for pretrial imprisonment. See W. Church, Habeas Corpus 21–32, 48–58 (2d ed. 1893).

[13] This development is explained in part by this Court's recognition that certain trial or sentencing defects could invalidate the proceedings in a court which had jurisdiction over the crime and the defendant, *e. g.*, *Ex parte Lange*, 18 Wall. 163 (1874), by the Court's decisions holding that some of the safeguards of criminal procedure embodied in the Bill of Rights are applicable to state criminal proceedings by virtue of the Due Process Clause of the Fourteenth Amendment, and by the requirement that a state prisoner exhaust state remedies before applying for federal habeas corpus. *Ex parte Royall*, 117 U. S. 241 (1886); 28 U. S. C. § 2254; see *Fay* v. *Noia*, 372 U. S. 391, 415–420 (1963).

provisions requiring *prompt* adjudication of the validity of the challenged restraint. See and compare Habeas Corpus Act of 1679, 31 Car. II, c. 2; Act of February 5, 1867, c. 28, 14 Stat. 385; and 28 U. S. C. § 2243. Third, at least tentatively in *Frank* v. *Mangum*, 237 U. S. 309 (1915), and more clearly in *Moore* v. *Dempsey*, 261 U. S. 86 (1923), this Court had recognized that a district court was authorized to look behind the bare record of a trial proceeding and conduct a factual hearing to determine the merits of alleged deprivations of constitutional rights [14]—a procedure that reached full flowering in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). Thus, by the time *McNally* was decided, the federal writ of habeas corpus was substantially a post-conviction device which could afford prompt adjudication of factual as well as legal issues. Keeping these purposes of the writ in mind, we turn to consideration of the *McNally* holding and the reasons which compel us to overrule it.

A federal jury had found McNally guilty of three counts of an indictment charging offenses under the Motor Vehicle Theft Act (now 18 U. S. C. §§ 2312–2313).[15] He had been sentenced to two years on the first

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[14] The Court in *Frank* recognized that the Act of February 5, 1867, c. 28, 14 Stat. 385, substituted "for the bare legal review that seems to have been the limit of judicial review under the common-law practice . . . a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'" 237 U. S., at 330–331. In *Moore*, the Court remanded the case to the District Court for determination of the truth of allegations that the pervading influence of a mob had denied the appellants a fair trial in the state court. 261 U. S., at 92.

[15] Because McNally was imprisoned by federal authorities, his application for habeas corpus relief could have rested on the clause of Rev. Stat. § 753 (1875) which authorized federal courts to entertain petitions from prisoners in the custody of the United States. However, the Court's interpretation of the custody requirement in

count and four years each on the second and third counts, the sentences on the first and second counts to run concurrently and the sentence on the third consecutively. In his application in a district court for a writ of habeas corpus, McNally claimed that the indictment failed to state an offense as to the third count. He did not attack the convictions under the first and second counts. When he filed his petition he was serving under the second count. The lower courts denied relief on the merits. But this Court affirmed on a jurisdictional ground, holding that because McNally had not begun to serve the sentence on the third count—and therefore was not "in custody" under that sentence—his petition for relief was premature:

> "[W]ithout restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." 293 U. S., at 138.

The effect of this disposition was ameliorated somewhat by the Court's suggestion that McNally might seek relief by another route. *Id.*, at 140. See also *Holiday* v. *Johnson*, 313 U. S. 342, 349 (1941). But cf. *Ex parte Hull*, 312 U. S. 546 (1941). Moreover, McNally's challenge was directed at the face of the indictment. Therefore, postponement of adjudication of his claims probably would not result in the loss of crucial evidence. But the harshness of a rule which may delay determination of federal claims for decades becomes obvious when applied to the cases of Rowe and Thacker. Their cases also exemplify the manner in which the decision in *McNally* cuts against the prior and subsequent development of the writ in the federal courts.

McNally was equally applicable to state prisoners claiming their incarceration violated the Constitution. *E. g., Darr* v. *Burford*, 339 U. S. 200, 203 (1950).

Both Rowe and Thacker allege that they were so inadequately represented at trial that they were denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments. Petitioner concedes that, but for *McNally*, respondents' allegations would entitle them to plenary hearings in the District Courts. Brief for Petitioner, p. 6. Yet, under the current schedules of confinement, it is argued, neither Rowe nor Thacker may obtain adjudication of his claims until after 1990. By that time, dimmed memories or the death of witnesses are bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact. Of course prejudice to meritorious claims resulting from the kind of delay which *McNally* imposes is not limited to situations involving ineffective assistance of counsel. To name but a few examples, factual determinations are often dispositive on claims of coerced confession, *e. g.*, *Reck* v. *Pate*, 367 U. S. 433 (1961); *Leyra* v. *Denno*, 347 U. S. 556 (1954), lack of competency to stand trial, *e. g.*, *Pate* v. *Robinson*, 383 U. S. 375 (1966), and denial of a fair trial, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966). Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice.[16] As the Court of Appeals observed:

> "Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the

[16] Even where resolution of constitutional claims turns on record evidence, loss, or destruction of a relevant document or failure to transcribe the record over a period of years, cf. *Norvelle* v. *Illinois*, 373 U. S. 420 (1963), could mean that a claim relegated to the limbo of prematurity might never be adequately determined.

> testimony of the responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary. It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established." [17] 383 F. 2d, at 715.

Clearly, to the extent that the rule of *McNally* postpones plenary consideration of issues by the district courts, it undermines the character of the writ of habeas corpus as the instrument for resolving fact issues not adequately developed in the original proceedings. To that extent, it also undermines *Moore* v. *Dempsey, supra,* and is inconsistent with subsequent decisions of this Court which have reaffirmed *Moore*. *E. g., Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *Brown* v. *Allen,* 344 U. S. 443 (1953); *Fay* v. *Noia,* 372 U. S. 391 (1963).

McNally is also at odds with the purpose of the writ of habeas corpus in another respect. As noted above, a principal aim of the writ is to provide for swift judi-

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[17] This consideration has led at least two States which previously followed the prematurity doctrine to reject it in recent years. See *Commonwealth ex rel. Stevens* v. *Myers,* 419 Pa. 1, 213 A. 2d 613 (1965); Ore. Rev. Stat. § 138.510 (1963). See also *Landreth* v. *Gladden,* 213 Ore. 205, 324 P. 2d 475 (1958). California does not follow the *McNally* rule. *In re Chapman,* 43 Cal. 2d 385, 273 P. 2d 817 (1954). Finally, while this case was under consideration in this Court, Virginia repudiated the prematurity doctrine by statute. See Va. S. No. 44, 1968 Sess., amending Va. Code Ann. § 8–596 (effective June 28, 1968). A committee of the American Bar Association which is inquiring into post-conviction remedies has recommended abandonment of the prematurity doctrine which it calls "one of the most frustrating elements of present post-conviction practice." Advisory Committee on Sentencing and Review, A. B. A. Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies 43 (Tent. Draft 1967).

cial review of alleged unlawful restraints on liberty. Calendar congestion, considerations of federalism, see, *e. g.*, *Fay* v. *Noia*, 372 U. S., at 415–420; *Ex parte Royall*, 117 U. S. 241 (1886), and the exigencies of appellate review account for largely unavoidable delays in the processing of criminal cases. But the prematurity rule of *McNally* in many instances extends without practical justification the time a prisoner entitled to release must remain in confinement. Rowe and Thacker eventually may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men. Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time.

The foregoing analysis demonstrates that *McNally* is inconsistent with the purposes underlying the federal writ of habeas corpus. Moreover, in arriving at its decision, the Court in *McNally* relied in part upon an unnecessarily narrow interpretation of the habeas corpus statute. Standing alone, the limitation of § 2241 (c) (3)—that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution"—is not free of ambiguity. However, in common understanding "custody" comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. Va. Code Ann. § 53–251 (1967); see n. 3, *supra*. Nothing on the face of § 2241 militates against an interpretation which views Rowe and Thacker as being "in custody" under the

aggregate of the consecutive sentences imposed on them. Under that interpretation, they are "in custody in violation of the Constitution" if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights. This approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed. It also eliminates the inconsistencies between purpose and practice which flow from the *McNally* holding. Meaningful factual hearings on alleged constitutional deprivations can be conducted before memories and records grow stale, and at least one class of prisoners will have the opportunity to challenge defective convictions and obtain relief without having to spend unwarranted months or years in prison.

We find unpersuasive the arguments made in *McNally* to support the narrower interpretation of the custody requirement. No prior decision of the Court was cited as clear authority for the prematurity doctrine.[18] To fill the gap, the Court relied on the history of the writ in England prior to 1789 and a line of reasoning whose unexamined premise was doubtful before *McNally* and was subsequently rejected. Both the historical and conceptual bases of the opinion are revealed in the Court's observation that "[d]iligent search of the English au-

[18] Of the prior decisions of this Court cited in *McNally*, only *In re Swan*, 150 U. S. 637 (1893), suggested a rule of prematurity. Even in *Swan*, the Court held no more than that the prisoner was not entitled to immediate discharge from confinement merely because the sentencing judge had imposed an allegedly unauthorized fine in addition to a valid prison term. 150 U. S., at 653. In at least two cases, *Morgan* v. *Devine*, 237 U. S. 632 (1915), and *Ex parte Spencer*, 228 U. S. 652 (1913), the Court had reached the merits of habeas corpus applications by prisoners who had not served the valid portions of their sentences. Though relief was ultimately denied in *Morgan* and *Spencer*, they illustrate that the prior decisions of the Court by no means compelled the *McNally* result.

thorities and the digest before 1789 has failed to disclose any case where the writ was sought or used . . . as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release." *McNally* v. *Hill*, 293 U. S., at 137–138. To the extent that the Court thought that the absence of Eighteenth Century English precedent demonstrated that McNally was not entitled to habeas corpus relief, the Court's reliance seems to have been misplaced. In light of the fact that English judges had no power to impose cumulative punishment in felony cases,[19] and apparently did not assume such power in misdemeanor cases until 1769,[20] it is not at all surprising that research failed to uncover a pre-1789 common-law analogy for McNally's petition for relief. In any event, the development of the writ of habeas corpus did not end in 1789. What we said of the writ in a similar context in *Jones* v. *Cunningham*, 371 U. S. 236 (1963), is equally applicable here.

> "[The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.*, at 243.

Of course the excursion in *McNally* into history to determine that the writ of habeas corpus issued only to adjudicate entitlement to "immediate release" was not unnecessary. Though *McNally held* only that the petitioner did not meet the custody requirements of the statute, see *Walker* v. *Wainwright*, 390 U. S. 335 (1968), that holding rested in part on the premise that physical discharge from custody is the only relief available in a

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[19] See *Regina* v. *Albury* [1951] 1 All E. R. 491 (Crim. App.); 1 Stephen, History of the Criminal Law of England 291–292 (1883).

[20] *Wilkes* v. *Rex*, 4 Bro. P. C. 360, 2 Eng. Rep. 244 (H. L. 1769).

habeas corpus proceeding. But the statute does not deny the federal courts power to fashion appropriate relief other than immediate release. Since 1875, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, "as law and justice require." Rev. Stat. § 761 (1875), superseded by 28 U. S. C. § 2243. Consistently with this command, this Court has held that a prisoner whose first-sentence parole was revoked upon a second conviction could challenge the second conviction in a habeas corpus proceeding though he would not be released if he prevailed, *Ex parte Hull*, 312 U. S. 546 (1941); that a person who was paroled after he filed his habeas corpus petition could still obtain relief from the restraints imposed by the parole conditions, *Jones* v. *Cunningham, supra;* and that a prisoner could attack the first of two consecutive sentences in a federal habeas proceeding even though he would still be confined under the second sentence if he succeeded, *Walker* v. *Wainwright, supra.* See also *United States* v. *Pridgeon*, 153 U. S. 48, 63–64 (1884). Thus, to the extent that *McNally* relied on the notion that immediate physical release was the only remedy under the federal writ of habeas corpus, it finds no support in the statute and has been rejected by this Court in subsequent decisions.

We overrule *McNally* and hold that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of § 2241 (c)(3).[21] This interpretation is consistent with the statutory language and with the purpose of the writ of habeas corpus in the federal courts.

Affirmed.

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[21] We intimate no views on the merits of respondents' underlying claims.